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MILITARY LAW REVIEW

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MILITARY LAW REVIEW

Volume 152 Spring 1996

ALEXANDER THE GREAT, THE GORDIAN KNOT, AND THE PROBLEM OF MULTIPLICITY IN THE MILITARY JUSTICE SYSTEM

MAJOR WILLIAM T. BARTO*

1. Introduction[1]

Alexander the Great crossed the Hellespont and invaded Asia Minor in 334 B.C. In the spring of the next year, he found himself at the gates of the Phrygian city of Gordium,[2] the home of the mythical figure Midas. Quintus Curtius Rufus, a Roman historian, tells what happened next.

> Alexander reduced the city and entered the temple of Jupiter. Here he saw the carriage on which they said Midas' father, Gordius, used to ride. In appearance it was little different from quite inexpensive and ordinary carriages, its remarkable feature being the yoke, which was strapped down with several knots all so tightly entangled that it was impossible to see how they were fastened. Since the local people claimed that an oracle had foretold mastery of Asia for the man who untied this impossible

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1 This article is based upon a paper presented by the author to the 1996 Judicial Conference sponsored by the United States Court of Appeals for the Armed Forces. I would especially like to thank Mr. Francis A. Gilligan, Senior Legal Advisor to Judge Crawford, for urging me to expand upon my remarks in the form of an article and spurring me to think critically about this difficult area of the law. I also thank Major Mark S. Martins, Deputy Director, Center for Law and Military Operations, whose insights and helpful comments helped make the original presentation a success.

2 QUINTUS CURTIUS RUFUS, THE HISTORY OF ALEXANDER 302 (Penguin Books 1984) [hereinafter Q. CURTIUS RUFUS].

> knot, the desire to fulfill the prophecy came over Alexander. The king was surrounded by a crowd of Phrygians and Macedonians, the former all in suspense about his attempt at untying it, the latter alarmed at the king's overconfidence—for, in fact, the series of knots was pulled so tight that it was impossible to work out or see where the tangled mass began or ended, and what particularly concerned them about the king's attempt at untying it was that an unsuccessful effort should be taken as an omen.[3]

Alexander eventually solved the problem of the original Gordian Knot in his own unique way.[4] The military justice system has confronted a Gordian Knot of its own for some time now; it is the knot formed by the intersection of the law of double jeopardy, multiplicity, and lesser-included offenses,[5] a knot so tightly entangled that it has confounded the efforts of the courts, commentators, and practitioners to untie it. Supreme Court Chief Justice Rehnquist has labeled the law in this area "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[6] In somewhat less colorful prose, Justice Blackmun once described the case law in this field as a "continuing struggle to create order out of the confusion and chaos of the lengthening list of . . . decisions."[7] The rhetoric has at times approached the theological, with Judge James of the Air Force Court of Military Review once asserting, in a now famous passage, that there is a particular inner circle of the eternal inferno in which "the damned endlessly debate multiplicity for sentencing."[8]

The United States Court of Appeals for the Armed Forces (CAAF or, as named prior to October 1994, the COMA, the Court of Military Appeals)[9] has done much to simplify the law of double jeopardy, multiplicity, and lesser-included offenses under the military

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3 *Id.* at 27.

4 ***See*** *infra* note 176 and accompanying text.

5 *Cf.* Whalen v. United States, 445 U.S. 684, 702 (1980) (Rehnquist, J., dissenting) (characterizing Supreme Court case law in this area "to be a true Gordian knot").

6 Albernaz v. United States, 450 **U.S.** 333, 343 (1981).

7 Sanabria **v.** United States, 437 U.S. 54, 80 (1978) (Blackmun, J., dissenting).

8 United States **v.** Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990).

9 On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the Court of Military Appeals; the new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purpose of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. ***See*** United States v. Sanders, 41 M.J. 485, 485 n.1 (1995).

justice system.[10] The CAAF has refashioned military practice in this area to be largely consistent with federal criminal practice,[11] except to the extent necessary to accommodate unique characteristics of the military justice system.[12] However, the court's recent decisions in this area have uncovered a number of perplexing questions for military justice practitioners.[13]

This article examines the current state of military practice in the area of double jeopardy, multiplicity, and lesser-included offenses; it identifies problems facing the military justice practitioner as well as the courts, and recommends how the military appellate courts, military justice practitioners, and the President may rectify the identified problems. Toward these ends, this article begins by exploring the meaning of the term multiplicity and scrutinizing its vices.[14] The article will then attempt to explain the current state of the law in the military justice system[15] and consider the ramifications for the military justice practitioner.[16] The article concludes with a proposal for reform.[17]

11. Multiplicity Defined

It is a useful, but sometimes overlooked, practice to begin any exploration of the law of multiplicity by defining the term "multiplicity." The dictionary tells us that it means "a multitude or great number" or "the state of being . . . manifold."[18] Far more useful for our purposes is the frequently-cited definition offered by Professor Wright in his treatise ***Federal Practice and Procedure:*** "'Multiplicity' is the practice of charging the same offense in several counts."[19] In the military, we could say that multiplicity is the practice of alleging the same

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[10] ***See, e.g.,*** United States v. Teters, 37 M.J. 370 (C.M.A. 1993), **cert. *denied,*** 114 S. Ct. 919 (1994); United States v. Foster, 40 M.J. 140 (C.M.A. 1994); United States v. Morrison, 41 M.J. 482 (1995).

[11] ***See*** United States v. Teters, 37 M.J. 370 (C.M.A. 1993), **cert. *denied,*** 114 S. Ct. 919 (1994).

[12] ***See, e.g.,*** United States v. Weymouth, 43 M.J. 329 (1995); United States v. Foster, 40 M.J. 140 (C.M.A. 1994).

[13] ***See infra*** notes 63-168 and accompanying text.

[14] ***See infra*** notes 18-38 and accompanying text.

[15] ***See infra*** notes 39-60 and accompanying text.

[16] ***See infra*** notes 61-156 and accompanying text.

[17] ***See infra notes*** 158-186 and accompanying text.

[18] THE RANDOM HOUSE COLLEGE DICTIONARY 876 (rev. ed. 1982).

[19] 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D 0142, at 469 (2d ed. 1982) [hereinafter WRIGHT].

offense in several charges or specifications.[20] Offenses that are found to be the "same" are then referred to as being "multiplicious."[21]

III. The Vices of Multiplicity

A. Why Are We Concerned?

The question arises as to why multiplicity and multiplicious offenses are things to be avoided; they do not appear to be, in and of themselves, bad things. Indeed, the commentary to the *American Bur Association Prosecution Function Standards* probably says it best by noting that a defendant who violates several statutory provisions in a single criminal transaction "can hardly complain of 'overcharging' if there is evidence of conduct supporting each charge."[22] Multiplicity is therefore undesirable only to the extent that it may breach certain constitutional, statutory, or regulatory prohibitions.[23]

B. Multiplicity and Double Jeopardy

Multiplicity potentially implicates several constitutional protections. The Fifth Amendment, in relevant part, prohibits the government from placing an individual twice in jeopardy of life or limb for the same offense.[24] This protection applies not only to consecutive trials for the same offense but it operates to prevent the imposition of multiple punishments for the same offense in a single trial.[25]

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[20] *Cf.* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 907(b)(3) discussion (1995 ed.) [hereinafter MCM] ("A specification may also be multiplicious with another if they describe the same misconduct in two different ways.").

[21] *Id.*

[22] AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9, at 77 (3d ed. 1993) [hereinafter ABA STANDARDS].

[23] *See* 1 WRIGHT, *supra* note 19, § 142, at 475-76. Judge Fletcher, writing for a divided COMA in *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983), *overruled in part, United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994), made a related and vital observation that is still true in spite of *Baker's* subsequent history; "[m]ultiplicity is a term which is barren of meaning unless it is considered with a particular procedural context." *Baker*, 14 M.J. at 364 n.1.

[24] U.S. CONST. amend. V.

[25] ***See*** North Carolina v. Pearce, 395 U.S. 711, 717 (1969). In the context of a single criminal trial, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165 (1977). Punishment, however, includes not only the sentence adjudged a convicted offender, but also the conviction itself. ***See*** Rutledge v. United States, 116 S. Ct. 1241, 1248 (1996) (citing Ball v. United States, 470 U.S. 856 (1985)). The inclusion of the conviction itself in the definition of punishment is, in the author's experience, often overlooked by courts and practitioners alike in the military justice system. The Supreme Court in *Rutledge* recently reminded all that "the collateral consequences of a second conviction [for the same offense] make it as presumptively impermissible to impose as it would be to impose any other unauthorized sentence." *Rutledge*, 116 S. Ct. at 1248.

This latter protection has been described by commentators and courts as the "multiple punishment doctrine,"[26] and it is considered the "oldest and most widely recognized guarantee in the Bill of Rights."[27] Accordingly, the primary vice of multiplicity is that it could lead to the imposition of multiple punishments for the same offens—a potential violation of the Constitution.[28] In the military justice system, violation of the multiple punishment doctrine can produce even more significant detrimental effects to an accused than in most civilian courts because the Rules for Courts-Martial provide that the maximum authorized punishment may be imposed for each offense of which the accused is found guilty.[29]

C. Multiplicity and Due Process

Another constitutional aspect of multiplicity has received little attention from the courts and practitioners. Multiplicity may have an adverse psychological effect on the trier of fact by suggesting that an accused has committed not one but several crimes,[30] thereby interfering with the due process rights of the accused to prepare and present a defense and to receive a fair trial under the rule of law.[31] Nevertheless, the courts have traditionally given the government "broad discretion to conduct criminal prosecutions, including . . . [the] power to select the charges to be brought in a particular case."[32] The United States Supreme Court has gone so far as to hold

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[26] ***See*** KENNETH G. SCHULER, CONTINUING CRIMINAL ENTERPRISE, CONSPIRACY, AND **THE** MULTIPLE PUNISHMENT DOCTRINE, 91 MICH. L. REV. 2220, 2223 (1993).

[27] ***See id.*** at 2222-23.

[28] ***See*** 1 WRIGHT, ***supra*** note 19, § 142, at 475.

[29] ***See*** M.C.M., ***supra*** note 20, R.C.M. 1003(c)(1); *cf.* United States v. Teters, 37 M.J. 370, 379 (C.M.A. 1993) (Cox, J., concurring) (observing that the crux of the multiplicity problem has been "the all or nothing, sentence-multiplier consequence of the multiplicity determination"), ***cert. denied,*** 114 S. Ct. 919 (1994).

[30] ***See id.*** at 475-76. Professor Wright's oft-cited text warns "that 'the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes.'" ***Id.*** (footnote omitted).

[31] *Cf.* United States v. Middleton, 12 U.S.C.M.A. 54, **58,** 30 C.M.R. **54, 57-58** (1960) (commenting that "[t]he exaggeration of a single offense into many seemingly separate crimes may, in a particular case, create the impression that the accused is a 'bad character' and thereby lead the court-martial to resolve against him doubt created by the evidence"); Pointer v. United States, 151 U.S. 396, 403 (1896) (recognizing "as fundamental the principle that the court must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury"), ***cited in*** United States v. Baker, 14 M.J. 361 (C.M.A. 1983), ***overruled in part,*** United States v. Teters, 37 M.J. 370 (C.M.A. 1993), ***cert. denied,*** 114 S. Ct. 919 (1994). ***But see supra*** note 22 and accompanying text. The exaggeration of the same offense into apparently separate offenses may also mislead the convening authority as to the seriousness of the criminal conduct in question; such pleading, if done deliberately, could raise "a grave question of perversion of the court-martial processes." ***See Middleton, supra,*** at 12 U.S.C.M.A. at 58, 30 C.M.R. at 58 (footnote omitted).

[32] Ball v. United States, 470 U.S. 856, 859 (1985).

"that even where the [Double Jeopardy] Clause bars cumulative punishment for a group of offenses, 'the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution.'"[33] In light of the breadth of the prosecutor's charging discretion, it appears unlikely that an accused would prevail on a motion to dismiss one or more offenses based upon an allegation that an array of charges and specifications violates either the right to a fair trial or the right to prepare and to present a defense.[34]

D. Multiplicity and the Unreasonable Multiplication of Charges

Regulatory limitations may also apply to multiplicity. The discussion accompanying Rule for Courts-Martial 307(c)(4) provides, in relevant part, that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one individual."[35] This suggestion[36] from the drafters of the Rules for Courts-Martial may stand apart from the constitutional limitations described above. This provision has traditionally been cited as the basis for a unique military treatment of multiplicity.[37] Multiplicity is a questionable practice because it is, by definition,

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[33] *Id.* at 860 n.7 (quoting Ohio v. Johnson, 467 U.S. 493 (1984)).

[34] This is not to say that an accused could not prevail if able to demonstrate that the government discriminated against a relevant class of defendants or acted vindictively in charging. *See generally* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 18-29.20, at 699-700.

[35] MCM, *supra* note 20, R.C.M. 307(c)(4) discussion. This suggestion is consistent with the traditional position that "a multiplication of charges arising out of the same transaction is frowned on in military law." United States v. Keith, 1 U.S.C.M.A. 442, 448, 4 C.M.R. 34, 40 (1952), *cited in* United States v. Middleton, 12 U.S.C.M.A. 54, 58, 30 C.M.R. 54, 58 (1960). It is interesting to note, however, that the intensity of the frown has apparently faded over time. In the 1951 *Manual*, the provision that counseled against unreasonable multiplication of charges from a single criminal transaction had the form and authority of an executive order. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 26.b. (1951 ed.) [hereinafter MCM (1951)]. In the current *Manual*, the same provision is merely "discussion" and "does not have the force of law;" it is instead "in the nature of a treatise, and may be used as secondary authority." *See* MCM, *supra* note 20, app. 21, at A21-3.

[36] *See* MCM, *supra* note 20, app. 21, at A21-3; *cf.* United States v. Wheeler, 40 M.J. 242, 244 (C.M.A. 1994) (calling the language "precatory").

[37] *See, e.g.*, United States v. Morrison, 41 M.J. 482, 484 n.3 (1995) (warning that a holding that offenses are separate "should not be read as carte blanche for unreasonable multiplication of charges by creative drafting"). *But cf.* 1 GILLIGAN & LEDERER, *supra* note 34, § 6-34.10, at 240 (describing charges and specifications that unreasonably multiply charges as "multiplicious"). The concepts of multiplicity and the unreasonable multiplication of charges are best viewed as conceptually related but nevertheless distinct; multiplicity can produce an unreasonable multiplication of charges, but not all unreasonable multiplication of charges is the result of multiplicity. *See* United States v. Cooper, No. 9400777, slip op. at 4 n.1 (Army Ct. Crim. App. 29 February 1996) (observing that "[m]ultiplicity analysis . . . does not always answer the question of whether charges have been unreasonably multiplied").

more likely to produce an unreasonable multiplication of charges than a more restrained charging posture.[38]

IV. Multiplicity and the Military Justice System:

Multiplex et Indistinctum Parit Confusionem[39]

A. *Why Is Multiplicity Still Important?*

Multiplicity is therefore an undesirable practice because, by alleging the same offense in multiple charges and specifications, the government may create an unreasonable multiplication of charges,[40] infringe upon the due process or the trial rights of the accused,[41] or violate the multiple punishment doctrine.42 Conversely, it is generally impermissible to allege separate offenses in a single specification.43 Therefore, it is fundamental that the military justice practitioner determine whether two or more offenses are separate or the same for multiplicity purposes.

B. *When Are Offenses the "Same Offense?"*

Offenses are the "same offense"[44] in military criminal practice if two conditions are met. First, the offenses must arise from the same act or transaction.45 The determination that offenses arise from the same act or transaction is primarily a factual determina-

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38 There has been surprisingly little case law explaining what the drafters meant by an "unreasonable multiplication of charges;" examples of multiplication of charges that were found to be unreasonable can be found in *United States v. Sturdivant,* 13 M.J. 323 (C.M.A. 1982), and *United States v. Thomas,* 26 M.J. 7 (C.M.A. 1988). For additional analysis as to what might be meant by an "unreasonable multiplication of charges," see *infra* notes 121-48 and accompanying text.

39 "Multiplicity and indistinctness produce confusion." BLACK'S LAW DICTIONARY 916 (5th ed. 1979).

40 *See supra* notes 35-38 and accompanying text.

41 *See supra* notes 30-34 and accompanying text.

42 *See supra* notes 24-29 and accompanying text.

43 MCM, *supra* note 20, R.C.M. 307(c)(4). It is beyond the scope of this article to discuss the use of so-called "mega-specifications" to allege misconduct by a military accused. For case law examining this practice, see for example *United States v. Mincey,* 42 M.J. 376 (1995) and *United States v. Poole,* 24 M.J. 539 (A.C.M.R. 1987), *aff'd,* 26 M.J. 272 (C.M.A. 1988). For practical advice on the use of mega-specifications, see *infra* note 150 and the authorities cited therein.

44 The phrase "same offense" has been described by Chief Justice Rehnquist as "deceptively simple in appearance but virtually kaleidoscopic in application." Whalen v. United States, 445 U.S. 684, 700 (1980)(Rehnquist, J., dissenting). Professor Wright called the determination whether the same or separate offenses have been charged a "difficult and subtle question." 1 Wright, *supra* note 19, § 142, at 476.

45 United States v. Teters, 37 M.J. 370, 377 (C.M.A. 1993) (citing Blockburger v. United States, 284 U.S. 299 (1932)), *cert. denied,* 114 S. Ct. 919 (1994).

tion. A transaction, for example, "is generally construed to embrace a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct."[46] Separate acts or transactions may properly be alleged in multiple charges and specifications and the separate acts may generally be the subject of separate convictions and punishment.[47]

C. *Legislative Intent*

If multiple offenses arise from the same act or transaction, then counsel must determine whether Congress intended that the offenses in question be considered as separate or the same.[48] The starting point for discerning legislative intent is the assumption that Congress does not ordinarily intend to punish a single criminal act or transaction under multiple statutory provisions.[49] When a single criminal act or transaction violates multiple statutory provisions, the statutes are "construed not to authorize cumulative punishment in the absence of a clear indication of contrary legislative intent."[50]

Counsel must use "[alll guides to legislative intent" in discerning whether Congress clearly indicated that they intended to allow

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[46] United States v. Baker, 14 M.J. 361, 366 (C.M.A. 1983), overruled *in part by* United States v. Teters, 37 M.J. 370 (C.M.A.1993), cert. denied, 114 S. Ct. 919 (1994); United States v. Sepulveda, 40 M.J. 856, 859 (A.F.C.M.R. 1994) (Young, J.) (identifying difference in time or locations of acts, absence or presence of break in criminal conduct, and opportunity of accused to reflect and choose not to commit further offenses as factors in determining whether "same act or transaction"); *cf.* 1 WRIGHT, *supra* note 19, § 143, at 481-82 (describing "transaction" as being subject to a flexible, pragmatic construction); FED. R. CR. P. 8(a) (permitting joinder of offenses against a single defendant if they "in the same series of acts or transactions constituting an offense or offenses").

[47] See MCM, *supra* note 20, R.C.M. 1003(c)(1)(C).

[48] See Garrett v. United States, 471 U.S. 773, 778 (1985); United States v. Albrecht, 43 M.J. 65, 67 (1995) (citing Teters, 37 M.J. at 376-77). The reason that the focus of this analysis is upon legislative intent is that the Fifth Amendment double jeopardy guarantee, from which the "same offense" language is drawn, serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted, the courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. Brown v. Ohio, 432 U.S. 161, 165 (1977). Some have observed that it is, at the very least, a facially unusual constitutional test that deems a constitutional protection to be controlled by legislative intent. See, *e.g.*, JAMES A. SHELLENBERGER & JAMES A. STRAZELLA, THE LESSER INCLUDED OFFENSE DOCTRINE AND THE CONSTITUTION: THE DEVELOPMENT OF DUE PROCESS AND DOUBLE JEOPARDY REMEDIES, 79 MARQ. L. REV. 1, 123 (1995).

[49] See Bell v. United States, 349 U.S. 81, 84 (1955) (Frankfurter, J.); Albrecht, 43 M.J. at 67 (noting assumption that "Congress 'does not intend to [twice] punish the same offense under two statutes"' (quoting Whalen v. United States, 445 U.S. 684 (1980)).

[50] Whalen v. United States, 445 U.S. 684,692 (1980).

multiple punishments for the same act or transaction.[51] Overt expressions of such legislative intent may be found in the language of the relevant statutes and their legislative histories.[52] The evidence of legislative intent to allow multiple punishments must nevertheless be ***clear.*** For example, the Supreme Court recently held in *Rutledge v. United States*[53] that the mere fact that a single act or transaction violates multiple sections of the federal criminal code "does not rise to the level of the clear statement necessary for us to conclude that . . . Congress intended to allow multiple punishments."[54]

The legislative intent concerning multiple punishments for the same act or transaction is not always clear.[55] In such cases, the legislative intent to allow multiple punishments may be presumed or inferred if the elements[56] of *each* offense require proof of a unique fact.[57] This "presumption of separateness" may nevertheless be overcome in turn when other recognized guidelines for discerning legislative intent clearly indicate that Congress did not intend to allow multiple punishments for the act or transaction in question;[58] "the . . .

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[51] *See* United States v. Woodward, 469 U.S. 105, 109 (1985).

[52] United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993), *cert. denied,* 114 S. Ct. 919 (1994) (citations omitted).

[53] 116 S. Ct. 1241 (1996).

[54] *Id.* at 1249 n.14. *But cf.* Garrett v. United States, 471 U.S. 773, 793 (1985) (observing that "[tlhe presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences").

[55] United States v. Hickson, 22 M.J. 146, 152 (C.M.A. 1986).

[56] The CAAF recently held that the elements to be used in this analysis include "those elements required to be alleged in the specification, along with the statutory elements." United States v. Weymouth, 43 M.J. 329, 340 (1995). For a discussion of the potential meaning of this holding, see *infra* note 110.

[57] *See Teters,* 37 M.J. at 376-77. If the elements of neither offense require proof of a unique fact, the offenses are the "same offense" and are multiplicious because they are identical. If the elements of only one offense require proof of a unique fact, then the offenses are multiplicious because they stand in the relationship of a greater and lesser-included offense.

[58] *Id.* at 377. It would appear from the text of this portion of the analysis that the same clarity of intent would be required at this point as was previously required to demonstrate a legislative intent to authorize multiple punishments. *See supra* notes 48-57 and accompanying text. However, the case law is unclear as to whether a higher or lower showing of intent is required. For example, in *United States v. Hickson,* the COMA held that adultery and rape could not be punished separately even though the elements of each offense required proof of a unique fact because "[i]t seems doubtful that Congress ever intended that an offense like adultery, which comes near the bottom of the hierarchy of sex offenses and fills a gap that otherwise might exist in the prohibition of sexual misconduct, would be used to enhance punishment for rape." *Hickson,* 22 M.J. at 155; *cf. Weyrnouth,* 43 M.J. at 338-40 (inferring legislative intent to prohibit multiple punishments for otherwise separate offenses because of congressional inaction). The generous nature of this intuitive reasoning stands in stark contrast to the language of the Supreme Court in *Albernaz v. United States* in which the Court stated that "if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind." *Albernaz,* 450 U.S. 333, 341-42 (1981). The better rule, in the author's assessment, is to be impartial and to demand the same clarity of intent to overcome either the presumption of sameness that began our analysis or the presumption of separateness arising out of comparison of the elements of each offense.

presumption must of course yield to a plainly expressed contrary view on the part of Congress."[59] In the absence of this intent, offenses arising from the same act or transaction that are ultimately determined to be separate offenses may be the subject of multiple punishments.[60]

V. Where Do We Go from Here?

The preceding description of the multiplicity methodology currently in place in the military justice system is, to a certain extent, misleading; its academic prose gives the impression of order and a well-settled jurisprudence that would not be recognized by most military justice practitioners. The fact of the matter is that military multiplicity practice remains quite dynamic. The CAAF has issued no less than thirteen opinions concerning multiplicity in the three years since that court ushered in the modern era of military multiplicity practice with its seminal decision in *United States v. Teters.*[61] The system described above merely represents a snapshot of military multiplicity practice at the time this article was written.[62] A closer examination reveals a number of questions and lingering problems that must be addressed by the military appellate courts, the

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[59] Garrett v. United States, 471 U.S. 773, 779 (1985).

[60] United States v. Morrison, 41 M.J. 482, 484 (1995). The CAAF's statement of its holding in *Morrison* has led to somewhat predictable consequences. The opinion of the court stated that "[w]e hold that the military judge did not err by ruling that the two specifications of willful disobedience were not multiplicious with the missing movement charge." *Id.* at 482. Anecdotal evidence reported to the author indicates that many military judges are continuing to treat otherwise separate offenses as the same offense for sentencing purposes because the court merely held that the military judge in *Morrison* did not err by treating the offenses as separate; the opinion did not say that it would be error to treat separate offenses as the same. Such a view conveniently overlooks subsequent statements by the CAAF and other military appellate courts indicating that offenses determined to be separate are separate for all purposes, including sentencing. *See, e.g.*, United States v. Weymouth, 43 M.J. 329. 336 (1995) (observing that "separate for findings equals separate for sentencing"). There may nevertheless be another solution to the often spectacular (and sometimes irrational) increase in the maximum punishment facing a given military accused after a determination that the charged offenses with which she is charged are separate. *See infra* notes 158-86 and accompanying text.

[61] United States v. Carroll, 43 M.J. 487 (1996); United States v. Weymouth, 43 M.J. 329 (1995); United States v. Albrecht, 43 M.J. 65 (1995); United States v. Strode, 43 M.J. 29 (1995); United States v. Raymer, 42 M.J. 389 (1995); United States v. Morrison, 41 M.J. 482 (1995): United States v. Loving, 41 M.J. 213 (1995), *aff'd*, 116 S. Ct. 1737 (1996); United States v. Wheeler, 40 M.J. 242 (C.M.A. 1994); United States v. Foster, 40 M.J. 140 (C.M.A. 1994); United States v. Brownlow, 39 M.J. 484 (C.M.A. 1994); United States v. Traxler, 39 M.J. 476 (C.M.A. 1994); United States v. Schneider, 38 M.J. 387 (C.M.A. 1993); United States v. Johnson, 38 M.J. 88 (C.M.A. 1993).

[62] For a historical treatment of military multiplicity practice, see either Major Thomas Herrington, *Multiplicity in the Military*, 134 MIL. L. REV. 45 (1991) or Colonel James A. Young III, United States Air Force, *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159 (1996).

President, and possibly even the Congress before we have seen the end of multiplicity as a problem for the military justice practitioner.

A. *What Do We Mean When We Say "Elements?"*

Without a clear expression of legislative intent authorizing multiple punishments for the same act or transaction, such intent may be presumed or inferred if the *elements* of each offense require proof of a unique fact.[63] A problem confronting the military justice system is that the meaning of the term "elements" has evolved rapidly. In its 1993 decision in *United States v. Teters*, the COMA held that "[i]t is now unquestionably established that this test is to be applied to the elements of the statutes violated, and not to the pleadings and proof of these offenses."[64] As such, the military justice practitioner in the period following *Teters* looked to the *statutory elements* of the relevant offenses when determining whether offenses arising from the same act or transaction were separate or the same offense.

Strict application of this rule, however, has at least one apparently unforeseen consequence. Article 134 of the Uniform Code of Military Justice (UCMJ), the so-called General Article,[65] is a punitive article under the UCMJ with two statutory elements: (1) that the accused did or failed to do certain acts, and (2) that, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[66] No other enumerated punitive article under the UCMJ expressly contains an element requiring proof that the accused's conduct was either prejudicial to the good order and discipline of, or of a nature to bring discredit upon, the armed forces.[67] As such, offenses arising under the General Article would always possess a unique element and could never be necessarily included in another enumerated punitive article.[68]

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[63] *See* United States v. Teters, 37 M.J. 370, 377 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994).

[64] *Id.*

[65] UCMJ art. 134. The text of the General Article is as follows:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

[66] MCM, *supra* note 20, pt. IV, para. 60.b.

[67] *See generally* UCMJ arts. 77-133.

[68] *Id.* art. 79.

The COMA addressed this situation with its decision in United States *v. Foster*.[69] In Foster, the COMA reasoned that the elements of each enumerated punitive article implicitly include either prejudice to good order and discipline or discredit to the armed forces.[70] As a result, the COMA held that "an offense arising under the General Article may, depending upon the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article."[71] Rather than resolving the issue, Foster created another a problem in that, if all offenses under the UCMJ now shared, expressly or implicitly, an element of either prejudice to good order and discipline or service discredit, then the remaining statutory element[72] of an offense arising under the General Article would never require proof of a fact not already required by the statutory elements of the enumerated articles. In other words, an offense arising under the General Article would *never* be a separate offense from an offense arising under an enumerated punitive article.[73]

The CAAF also answered this question, albeit indirectly, in United States *v. Weymouth*,[74] where the lead opinion held that the elements of the offense to be used in making multiplicity determinations included not only the statutory elements but also "those elements required to be alleged in the specification."[75] Offenses without detailed statutory elements, such as those arising under the General Article, and others with non-statutory elements, such as the various custom-based or disobedience offenses,[76] can therefore be either separate from, or multiplicious with, other offenses based upon the same act or transaction depending on the contents of the pleadings in a given case. The court called this method the "pleadings-elements" approach to multiplicity determinations,[77] which the military appellate courts and trial judges have already begun to use in resolving multiplicity issues.[78]

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69 **40** M.J. 140 (C.M.A. 1994).

70 *Id.* at 143.

71 *Id.*

72 The accused did or failed to do certain acts. MCM, ***supra*** note ***20,*** pt. IV, para. 60.b.(1).

73 Under this rule, an offense arising under the General Article would ***always*** be necessarily included in an offense arising under an enumerated punitive article, thereby producing the anomalous result that a lesser-included offense to an enumerated punitive article could have a higher maximum punishment than the "greater" offense. ***Compare*** UCMJ art. 128 ***with*** MCM, ***supra*** note ***20,*** pt. IV, para. 64.e.(1).

74 43 M.J. 329 (1995).

75 *Id.* at 340.

76 ***See, e.g.,*** UCMJ art. 92.

77 ***Weymouth,*** 43 M.J. at 335.

78 ***See, e.g.,*** United States v. Benavides, 43 M.J. 723 (Army Ct. Crim. App. 1995) (citing *Weymouth*).

B. What Should We Mean When We Say "Elements?"

The pleadings-elements approach to multiplicity determinations announced in *Weymouth* offers much to the military justice practitioner.[79] One experienced commentator recently opined that the "pleadings-elements test may . . . be the clear, consistent, and relatively easy-to-apply standard for which military justice practitioners have been waiting."[80] The pleadings-elements approach is already used in a majority of state jurisdictions.[81] One could argue that adopting the pleadings-elements analysis merely formalizes the approach already used by the military appellate courts for some time.[82] The use of a pleadings-elements test will, by definition, increase the number of offenses that are multiplicious with one another, thereby mitigating the potentially harsh effects of consecutive sentencing mandated by the Rules for Courts-Martial.[83] Additionally, its use at the charging phase of trial will reduce the likelihood that the government could unreasonably multiply the charges arising from the same act or transaction against an accused.[84]

Adopting the pleadings-elements test represents a departure from the practice of relying upon statutory elements in making multiplicity determinations announced just three years ago in *United States v. Teters*.[85] Moreover, the *Weymouth* decision represents a divergence from the federal practice in this area.[86] Therefore, it is

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79 The lead opinion in *Weymouth* cites a number of factors in support of its adoption of the pleadings-elements test that need not be considered here. *Weymouth*, 43 M.J. at 333-37. *But cf.* **YOUNG**, *supra* note 62, at 173 (observing that the lead opinion failed to show how the factors cited justify a departure from federal practice).

80 **YOUNG**, *supra* note 62, at 175.

81 *See* **SHELLENBERGER**, *supra* note 48, at 11 n.20 (1995).

82 For example, in both *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), and *United States v. Wheeler*, 40 M.J 242 (C.M.A. 1994), the reviewing court made express reference to the pleadings in each case in resolving the multiplicity issues before it. *See, e.g., Foster*, 40 M.J. at 145 n. 5; *Wheeler*, 40 M.J. at 246-47.

83 *Cf.* United States v. Teters, 37 M.J. 370, 379 (C.M.A. 1993)(Cox, J., concurring) (observing that "[i]t is the all-or-nothing, sentence-multiplier consequence of the multiplicity conclusion, primarily, that has fueled this internecine conflict all these years"), *cert. denied*, 114 S. Ct. 919 (1994).

84 *See, e.g., Weymouth*, 43 M.J. at 336-37.

85 The lead opinion in *Weymouth* attempts to reduce the apparent breadth of this departure by characterizing the adoption of the pleadings-elements test as a "clarification" of the standard adopted in *Teters*. *Weymouth*, 43 M.J. at 340. While both tests purport to rely upon the elements of the offenses in question while making multiplicity determinations, it would be difficult to avoid the conclusion that the case-specific, "prosecutor-driven" methodology of the pleadings-elements test differs a great deal from the abstract, legislatively-focused method announced in *Teters*.

86 The Supreme Court has characterized federal practice as follows:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States:* 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct

useful to examine the effect of a wholesale adoption of the pleadings-elements approach and whether the application of the test should be limited in some way.[87]

Many factors support the retention of an approach to multiplicity determinations that relies primarily upon statutory language in discerning legislative intent. Congress mandates in Article **36,** UCMJ, that the procedural rules in the military justice system "shall, so far as . . . practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[88] The practical effect of this mandate extends far beyond the procedural realm and one can easily see a trend in modern military jurisprudence toward applying federal principles of law so far as practicable in substantive areas of the military justice system. The COMA in Teters derived its statutory elements test from federal precedents, and as such, the so-called Teters Test is certainly consistent with federal multiplicity practice.[89]

Further support for the continued vitality of a statutory elements approach to multiplicity determinations can be found in the very nature of the Double Jeopardy Clause. The constitutional prohibition against multiple punishments for the same offense is a limitation upon the ability of the courts to impose such punishments, but it is not a limitation upon congressional power to create and to define federal and military offenses.[90] Thus, as the CAAF recently noted in its unanimous opinion in United States *v. Albrecht,*[91] "the key to a question of multiplicity is the oft-sought-after but frequently elusive intent of Congress" as to whether a military accused can receive multiple punishments for the same act or transaction.[92] The statutory elements test is, quite simply, a better method of discerning legislative intent than the pleadings-elements approach. The reason for this is clear; the statute and its elements are products of

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> statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." This test emphasizes the elements of the two crimes. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

Brown v. Ohio, 432 U.S. 161, 166 (1977) (citations omitted).

87 *Cf.* YOUNG, *supra* note 62, at 175 (calling for restrictive application of the pleadings-elements test); CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: A BIOGRAPHY OF OLIVER WENDALL HOLMES 292 (1943)(quoting Justice Holmes as stating "If it is a bad rule, that is no reason for making a bad exception to it.").

88 UCMJ art. *36.*

89 United States v. Teters, 37 M.J. *370,* 373-76 (C.M.A. 1993), **cert. *denied,*** 114 S. Ct. 919 (1994).

90 ***See id.*** at 373.

91 **43** M.J 65 (1995).

92 *Id.* at 67.

Congress, while the pleadings are the fact-driven products of the charging officials in a particular case. If the issue truly is one of *legislative* intent, then the statutory elements test is generally going to be a far better vehicle for identifying that intent.[93]

Two prudential concerns also favor retaining of the statutory elements test to the extent practicable. The *Teters* approach to multiplicity is less prone to manipulative pleading or, as the court labeled it in *Weyrnouth,* "prosecutorial 'cuteness.'"[94] What the court may have meant is that prosecutors could choose to omit essential facts from pleadings to ensure that offenses are treated as separate for multiplicity purposes.[95] Another danger is the inadvertently sloppy draftsman who pleads a specification in such a way that converts otherwise separate offenses into the same offense.[96] In either case, the statutory elements test renders the scrivener's word choice largely irrelevant in multiplicity determinations; thereby, making it easier for all parties to resolve multiplicity problems in advance of trial and maybe even in advance of the preferral of charges. The statutory elements approach adds certainty to the litigator's plight and enhances judicial economy by its ease of application. Therefore, it should remain the primary means of evaluating potential violations of the multiple punishment doctrine.[97]

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93 In *Whalen v. United States,* Justice Rehnquist wrote in dissent that "because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment." 445 **U.S 684,** 711 (1980).

94 United States v. Weymouth, 43 M.J 329, at **334 n.4** (1995).

95 *See id.* Judge Cox pointed out that the President requires the allegation of critical facts in the specification, and that there are "abundant remedies" for specifications that are deficiently pled.

96 The court in *Weymouth* stated that they "need not decide here if the Government could create a lesser offense merely by alleging extra, non-essential elements." Id. at **337** n.5. It would appear, however, that is exactly what the court condoned by its holding in *Weymouth.* For example, attempted murder and aggravated assault are separate offenses by strict reference to their statutory elements; attempted murder requires a specific intent to kill, and aggravated assault requires several unique facts, including an assault, a means or force likely to inflict death or grievous bodily harm, or the actual infliction of grievous bodily harm. However, the court looked to the pleadings in the case and held that the trial judge did not err by treating the assault charges in the case as multiplicious with the attempted murder. *Id.* at 337.

97 Another method of dealing with the problem of "prosecutorial cuteness" is to establish the rule of law that the pleadings in a given case could convert two or more offenses that were statutorily separate into the same offense, but could never transform offenses that are statutorily the same offense into separate offenses. The problem with this remedy is, of course, that it would place the military justice system in a position similar to that in which we found ourselves after *Foster;* offenses arising under the General Article would always would be found to be the same offense as an offense arising under an enumerated punitive article based upon the same act or transaction. The proposed rule of law could, however, be used effectively in tandem with the recommendations concerning the use of "regulatory elements" found below. *See infra* notes 102-10 and accompanying text.

C. When Would We Ever Need a Pleadings-Elements Test?

In light of the arguments in favor of retaining the statutory elements test, why would the military justice system ever need a pleadings-elements test? The most persuasive reason offered by the court in *Weymouth* was that the UCMJ contains a number of offenses that do not, when detached from a specific pleading, provide adequate notice to an accused of the charge.[98] The most readily identifiable include the General Article and the various offenses involving unbecoming conduct by officers[99] and disobedience to orders.[100] Military customs, orders, and other non-statutory factors define these offenses, which complicates application of the statutory elements test.[101]

For example, the President has described in part IV of the *Manual for Courts-Martial* the "elements" of at least fifty-four offenses arising under Article 134, UCMJ, that could be used by the courts in determining whether those offenses require proof of a unique fact.[102] The military appellate courts have historically used presidentially-described "regulatory" elements[103] for making multiplicity and lesser included offense determinations.[104] Based on the inherent authority of the President, these regulatory elements could

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98 *Weyrnouth*, 43 M.J. at 335. For a review of the other factors cited by the court as supporting a divergence from the federal practice of relying upon the statutory elements of offenses in making multiplicity determinations, *see id.* at 333-37. *But cf.* YOUNG, *supra* note 62, at 173 n. 115 (observing that "Judge Cox failed to note how any or all of these differences in procedure justify his conclusion that the military need not follow the Supreme Court's determination of the meaning of 'an offense necessarily included in the offense charged"').

99 UCMJ art. 133.

100 *Id.* arts. 90-92.

101 *Weyrnouth*, 43 M.J at 335.

102 These "regulatory elements" are, in a manner of speaking, aggravating factors that allow the court-martial to impose a given sentence if they are pled and proven beyond a reasonable doubt. Otherwise, the maximum penalty for an offense would be determined in accordance with the limitations in R.C.M. 1003(c)(1).

103 Military appellate courts have also have referred to these elements as "pleadings elements." *See, e.g.*, United States v. Benavides, 43 M.J. 723, 725 (Army Ct. Crim. App. 1995). While this term is descriptive in the sense that the elements described by the President in part IV of the *Manual* must be pled and proven beyond a reasonable doubt, it may also lead to confusion if it is applied without distinction to offenses described by the President, unenumerated offenses arising under the General Articles, or to other "non-statutory" elements of disobedience offenses. *See Weyrnouth*, 43 M.J. at 335. The author therefore proposes the term regulatory elements to describe the elements of offenses arising under Article 134, UCMJ, that have been enumerated in part IV of the *Manual*, while "pleading elements" should probably be reserved for unenumerated or otherwise non-statutory elements required to be alleged in the pleadings in a given case.

104 *See, e.g.*, United States v. Foster, 40 M.J. 140, 145 (C.M.A. 1994) (using the regulatory elements for indecent assault in lesser-included offense determination); United States v. Wheeler, 40 M.J. 242, 246 (C.M.A. 1994) (using regulatory elements to make multiplicity determinations involving adultery, indecent acts, and other offenses).

be considered by the courts and practitioners as the equivalent of statutory elements for multiplicity determinations;[105] thus, eliminating the ***need*** for recourse to the pleadings in cases involving offenses described by the President as arising under the General Article.

Another category of offenses arising under the General Article that do not require recourse to a pleadings-elements approach is that of "crimes and offenses not capital'' prescribed by clause three of Article 134.[106] These are state and federal statutory offenses that are made part of the military penal code under certain circumstances.[107] The statutory elements of these offenses are as discernible as those of any other category of statutory offenses[108] and would not require supplementation from the pleadings in a given case.

The only categories of offenses that would appear to truly ***require*** the application of a pleadings-elements approach to multiplicity determinations are:

(1) Unenumerated neglects and disorders arising under either clause one or two of Article **134,** UCMJ.

(2) Unbecoming conduct committed by officers in violation of Article **133,** UCMJ.

(3) Disobedience offenses arising under Articles **90-92,** UCMJ.[109]

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105 *See* United States v. Zubko, 18 M.J. 378, 383-85 (C.M.A. 1984). The Air Force Court of Military Review recently stated that "when prosecutions for multiple offenses under Article 134 are examined for multiplicity, we believe each paragraph of Part N of the *Manual for Courts-Martial* must be considered a 'statute' for purposes of analysis." United States v. Neblock, 40 M.J. 747, 749 (A.F.C.M.R. 1994), *pet. for review denied,* 42 M.J. 96 (1995).

106 *See* UCMJ art. 134.

107 *See generally* MCM, *supra* note **20,** pt. N, para. 60(c)(4).

108 The President requires practitioners to allege each element of the federal or assimilated state statute in the specification, and recommends that the statutory source of the elements be identified in the pleadings. *Id.* para. 60(c)(6)(b).

109 The lead opinion in *Weyrnouth* asserted that "[c]ountless military offenses derive their elemental essence from regulations or orders, [or] customs of the service." *Weymouth,* 43 M.J. at 335. However, the opinion cites only three disobedience offenses in support of this proposition: (1) willful disobedience of a lawful command of a superior commissioned officer in violation of Article 90(2), UCMJ; (2) willful disobedience of the lawful order of a warrant officer, noncommissioned officer, or petty officer in violation of Article 91(2), UCMJ; and (3) other failure to obey orders or regulations in violation of Article 92, UCMJ. *Id.* All three offenses have statutory elements that can be used in making multiplicity determinations. *Cf.* United States v. Traxler, 39 M.J. 476, 479 (C.M.A. 1994) (agreeing with, but not relying upon, the proposition that disobedience and missing movement each required proof of unique facts). The President expressly recommends that only in specifications alleging a failure to obey "other orders" in violation of Article 92(2) need the order itself "be set forth verbatim or described in the specification." MCM, *supra* note **20,** R.C.M. 307(c)(3) discussion. In this light, it is unclear to the author why the requirement to prove at trial that a lawful order or regulation has been given and disobeyed necessitates the use of the plead-

For the large, indeed overwhelming, majority of offenses arising under the UCMJ, the statutory elements are both available and sufficient for multiplicity determinations. This aspect, combined with the many virtues of the statutory elements approach, at the very least suggest, and should compel, the limitation of the use of the pleadings-elements approach to those circumstances described above in which it is truly necessary.[110]

VI. The Unreasonable Multiplication of Charges Revisited

The dramatic departure from the exclusive use of the statutory elements in making multiplicity determinations announced by the CAAF in *Weymouth* tends to overshadow a significant procedural aspect of the case. In *Weymouth,* the accused had been charged with attempted murder, intentional infliction of grievous bodily harm, assault with a means or force likely to inflict death or grievous bodily harm, and assault with intent to commit murder.[111] The military judge, upon defense motion, dismissed the three assault specifications as lesser-included offenses of the attempted murder.[112] The

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ings in a given case to resolve multiplicity issues. *But cf.* YOUNG, *supra* note 62, at 172-73 n.110 (questioning the extent and effect of "non-statutory" military offenses while agreeing that resolution of multiplicity issues involving regulations necessitates reference to the pleadings).

[110] Whatever the CAAF decides to do concerning the applicability and meaning of the pleadings-elements test, there is one aspect of the court's decision in *Weymouth* that requires clarification in subsequent cases. The question stems from the court's statement that "those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test." *Weymouth,* 43 M.J. at 340. The lead opinion did not explain what was meant by "those elements required to be alleged in the specification," or how they differ from the statutory elements already required to be pled. The Rules for Courts-Martial provide that "[a] specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." MCM, *supra* note 20, R.C.M. 307(c)(3). The elements in question may be those described by the President in part IV of the *Manual* for offenses arising under the General Article. *See supra* notes 102-105 and accompanying text. Alternatively, it may have been that the court was referring to those *facts* required to be alleged in a specification alleging an offense that has "extra-statutory" or non-statutory elements. At least one commentator fears that "[i]f, by the pleadings-elements test, Judge Cox meant to incorporate consideration of all the *facts* pled in the specifications in determining multiplicity and lesser-included offenses, then consistency of application will be lost, and we will have returned to the 'fairly embraced' standard Judge Cox disavows." YOUNG, *supra* note **62,** at 175. This assertion may overstate the proximity between the "fairly embraced' standard rejected by the COMA in *Teters* and the pleadings-elements approach adopted in *Weymouth,* but is unquestionably correct in so far as it asserts that the pleadings-elements approach, to the extent that it considers the facts as pled in the specification, represents movement away from the statutory elements standard of federal practice and movement toward the old standard that relied on the pleadings and proof at trial to resolve multiplicity issues. In either case, the CAAF should take the first opportunity to explain what elements, other than those found in the statute, are required to be alleged in the Specification.

[111] *Weymouth,* 43 M.J. at 330.

[112] *Id.*

prosecution appealed and the Air Force Court of Military Review denied the government petition.[113] The CAAF held, in response to four certified issues from The Judge Advocate General of the Air Force, "that the military judge did not abuse his discretion in provisionally dismissing the assault specifications."[114]

The issue in *Weymouth* was, unlike most appellate decisions involving multiplicity, one of *charging;* the court had to answer the question of "how many specifications may be published to the court members during the pendency of trial on the merits?"[115] The court noted in its opinion that "the parties understood and the accused agreed that the various assault charges were lesser-included offenses" to the charge of attempted murder.[116] The government, however, "sought to proceed to findings with the alternate charges before the factfinder."[117] The *CAAF* ultimately concluded that, in the absence of exigencies of proof that might justify alternative charging, "the military judge did not abuse his discretion in ordering the case to go forward on the attempted murder charge alone."[118]

The ultimate basis for the court's decision may be found in the discussion accompanying Rule for Courts-Martial 307(c)(4), which provides the following:

> What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges

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113 *Id.* at 330-31.

114 *Id.* at 331.

115 *Id.* at 336.

116 *Id.* at *337.* One could reasonably question the accuracy of this conclusion. The regulatory elements of assault with intent to commit murder require proof of at least a simple assault, MCM, supra note 20, pt. IV, para. 64.b.(1), whereas the offense of attempted murder does not require any type of assault, *see* United States v. Valdez, 40 M.J. 491, 495 (C.M.A. 1994) (holding that the calculated withholding of medical attention alone plus the requisite intent stated the essence of unpremeditated murder), but requires only proof of an overt act amounting to more than mere preparation to murder another, MCM, *supra* note 20, pt. IV, para. 4.b.; proof of the former necessarily establishes proof of the latter, but the reverse is not the case. Because both offenses require a specific intent to kill, it would appear that the elements of attempted murder actually constitute a qualitative subset of the elements of assault with intent to commit murder; one could conclude that attempted murder is therefore an included offense of assault with intent to commit murder. This would produce the unusual, but not impossible, situation of an included offense that carried a greater maximum punishment than the "greater" offense in which it was necessarily included. *Cf.* United States v. Ramsey, 40 M.J. 71, 75 (C.M.A. 1994) (observing that, in spite of the troubling illogic of punishing an included offense with the same severity as greater offense, the military judge erred in doing otherwise); compare MCM, supra note 20, pt. IV, para. 4.e., *with id.* para. 64.e.(1). *But cf.* United States v. Dixon, 509 U.S. 688, 718 (1993) (Rehnquist, J., concurring) (rejecting conclusion that offense with greater punishment could ever be lesser included offense). This counterintuitive result may, to some extent, explain the CAAF's move to a pleadings-elements approach to multiplicity determinations.

117 *Weymouth,* 43 M.J. at 330.

118 *Id.* at 337.

> against one person. For example, a person should not be charged with both failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave. There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. *In no case should both an offense and a lesser included offense thereof be separately charged.*[119]

In other words, the simultaneous charging of both a greater and lesser-included offense is, in the absence of exigencies of proof, an unreasonable multiplication of charges.[120]

A. *What Is "Unreasonable?"*

The *Weymouth* decision clarifies the CAAF's position concerning the alternative charging of an offense arising under an enumerated punitive article and an analogous offense arising under the General Article. Although such charging may be "sound practice,"[121] the military judge retains the discretion to dismiss one or more of the alternative charges if such multiplication of charges is unreasonable.[122] *Weymouth* is also useful, in a larger sense, to the military justice system as a whole; it is an indirect reminder that beyond cases like *Weyrnouth* involving alternative charging of greater and lesser-included offenses, there is little useful precedent describing just what constitutes an unreasonable multiplication of charges.[123]

This is not to say that there is no precedent to which the practitioner could turn in evaluating a given multiplication of charges. In *United States v. Taylor,*[124] the government charged the accused with fifteen specifications of unauthorized absence arising out of a

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119 MCM, *supra* note 20, R.C.M. 307(c)(4) discussion (emphasis added) (citations omitted).

120 *But cf.* United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994) (stating that "it seems clear to us that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives").

121 *Id.*

122 *See Weymouth,* 43 M.J. at 337.

123 *But cf. infra* notes 124-135 and accompanying text. There also are the somewhat cryptic remarks by the drafters of the *Manual* in the discussion accompanying R.C.M. 307(c)(4): "For example, a person should not be charged with both failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave." MCM, *supra* note 20, R.C.M. 307(c)(4) discussion. The reason for this prohibition is not provided by the drafters, and is somewhat unclear since the offenses described may not be multiplicious with, or greater and lesser-included offenses of, one another. *See id.* pt. IV, para. 10.d.

124 **26** M.J. 7 (C.M.A. 1988).

six-day work-stoppage.[125] On appellate review, the COMA found this multiplication of charges unreasonable[126] and remanded the record of trial to the service court for consolidation of the specifications and charges to allege derelictions of duty and authorized either a reassessment of the sentence or a rehearing as to sentence.[127]

In United States *v. Sturdivant*,[128] the COMA considered the case of an accused who was charged with ten drug-related offenses arising out of a single incident.[129] The unanimous court reasoned that the '"exaggeration of a single offense into many seemingly separate crimes' has helped induce 'the court-martial to resolve against him doubt created by the evidence,"' and concluded that "[i]f there was ever to be a case in which we set aside findings of guilt because of 'unreasonable multiplication of charges,' this is it."[130] The court set aside the remaining findings of guilt and the sentence and dismissed the charges.[131]

A more recent, albeit less egregious, example of overcharging that was nevertheless held by the Army Court of Criminal Appeals (ACCA) to be an "unreasonable multiplication of charges" is found in United States *v. Bray*.[132] In Bray, the ACCA held that charging an accused with both false official statement and false swearing for the same utterance was an unreasonable multiplication of charges.[133] The ACCA noted that, although the elements of each offense required proof of a fact that the other offense did not, "charging the appellant with violation of both Article 107 and Article **134,** UCMJ, . . . serves no legitimate governmental interest."[134] The court set aside the findings of guilt as to the false swearing charge and dismissed the charge and its specification.[135]

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125 *Id.* at 7-8.

126 The court stated that it was "logically and legally absurd to attempt to justify the charging in this case by reliance upon the idea that there were separate evils to be punished by each type of charge. *Id.* at 8.

127 *Id.* at 9. The court concluded "that it is more reflective of the true nature of [the accused's] . . . misconduct to charge that, on each day of appellant's activity, he was guilty of willful dereliction of all his duties that day." *Id.* at 8.

128 13 M.J. 323 (C.M.A. 1982).

129 *Id.* at 324-25.

130 *Id.* at 330 (quoting United States **v.** Middleton, 12 U.S.C.M.A. 54, 30 C.M.R. 54 (1960)).

131 *Id.*

132 No. 9500944 (Army Ct. Crim. App. 29 March 1996) (per curiam memorandum opinion).

133 *Id.* at 2.

134 *Id.*

135 *Id.*

B. The Search for Standards

These three cases are indisputable examples of unreasonable multiplication of charges but the courts nevertheless failed to articulate a practical standard for determining whether a given multiplication of charges is unreasonable.[136] The military appellate courts should take every available opportunity in the aftermath of *Weymouth* to clarify this area of the law and articulate such a standard.[137]

A number of potential sources to which the courts could turn in fashioning such standards exist. As a starting point, the courts could look to the relevant precedent and systematize the analysis already there by formally identifying what factors led to the conclusions in cases like *Sturdivant, Thomas,* and others.[138] Another possible source of factors that may be used in evaluating the reasonableness of the charging decision is the relevant standards of professional responsibility applied to the charging process.[139]

The *American Bar Association Standards for Criminal Justice (ABA Standards)*[140] include standards for the prosecution function that may be useful in evaluating the reasonableness of the charging decision.[141] The basic ethical rule concerning the charging decision

[136] The *Bray* decision may actually be the most useful of the three because it gives the inklings of a test that can be used by counsel to resolve whether offenses represent an unreasonable multiplication of charges: separate offenses arising out of a single criminal transaction may nevertheless be an unreasonable multiplication of charges unless the prosecution can articulate a *legitimate governmental interest* necessitating the prolix pleading. For a more expansive treatment of potential factors that could be used in evaluating the reasonableness of the charging decision. *see infra* notes 139-48 and accompanying text.

[137] One could respond that the "unreasonableness" of a given multiplication of charges is based upon a totality of the circumstances in the case at hand. and as such resists further definition by the courts. While there is a great deal of truth to this potential observation, the courts could nevertheless identify the relevant *circumstances* whose totality would be the subject of evaluation.

[138] *See supra* notes 124-135 and accompanying text.

[139] Some may be reluctant to adopt factors derived from ethical standards as a method of evaluating the propriety of the charging decision; such a technique would seemingly turn every motion to dismiss or for appropriate relief from an unreasonable multiplication of charges into an allegation of prosecutorial misconduct. There are, however, two points that must be raised in response to such a complaint. The author is not suggesting that the standards be adopted in their entirety as a method in these circumstances, but merely that some of the factors considered relevant in the ethical evaluation of the charging decision also may be relevant in determining its reasonableness under R.C.M. **307.** Moreover, there *is* an ethical component (albeit frequently overlooked) to the charging decision, and an overlap in standards of evaluation in these two areas of the law should not surprise the informed and experienced observer. *See infra* note 142.

[140] ***See*** *supra* note 22.

[141] The standards contained in the second edition of the AEA *Standards for Criminal Justice* apply to all counsel in Army courts-martial "[u]nless they are clearly inconsistent with the UCMJ, the MCM, and applicable departmental regulations." DEP'T OF ARMY. REGULATION 27-10, LEGAL SERVICES: MILITARY JUSTICE. para. 5-8 18 August 1994).

is that the government "should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense."[142] The *ABA Standards* identify a number of factors that properly may be considered by prosecutors in selecting which offenses to charge. The factors also may be useful in examining the reasonableness of the ultimate selection of offenses to charge. These factors include the extent of harm caused by the offense, the relationship between the authorized punishments and the particular offense or offender, and the availability and likelihood of prosecution by another jurisdiction.[143]

Another potential source of evaluative factors is the *United States Attorneys' Manual (USAM)* published by the Department of Justice.[144] The *USAM* contains the *Principles of Federal Prosecution,* a statement of policies and procedures "designed to assist in structuring the decision-making process of attorneys for the government."[145] The *Principles of Federal Prosecution* provide, in relevant part, that "[i]t is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done."[146] As such, multiple offenses may be charged only when necessary to adequately reflect the nature and extent of the criminal conduct involved and provide the basis for an appropriate sentence under all the circumstances of the case or when an additional charge or charges would significantly strengthen the case against an individual.[147] The presence or absence of these factors in a military charging decision also may be used in evaluating the reasonableness of a multiplication of charges.[148]

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142 ABA STANDARDS, *supra* note 22, Standard 3-3.9(f); *cf.* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS para. 43.6, at 130 (1991) ("The prosecutor should exercise his discretion to file only those charges which he considers to be consistent with the interests of justice.") [hereinafter NATIONAL PROSECUTION STANDARDS].

143 ABA STANDARDS, *supra* note 22, Standard 3-3.9(b).

144 DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL [hereinafter USAM].

145 *Id.* § 9-27.001, at 1.

146 *Id.* § 9-27.320B.

147 *Id.*

148 This treatment is not intended to be an exhaustive list of either the potential sources of evaluative factors or the factors themselves, but it is an initial effort to identify means by which the reasonableness of the charging decision can be systematically evaluated. Other factors that may be relevant include the absence of sufficient admissible evidence to warrant prosecution on a certain charge. ***See*** United States v. Asfeld, 30 M.J. 917, 929 (A.C.M.R. 1990) (the presence of evidence that the government "piled on" to "unduly leverage an accused to forego his or her right to trial."). ***See*** ABA STANDARDS, *supra* note 22, at 77 (treatment of prior punishment of the accused under Article **15,** UCMJ). ***See*** TRIAL COUNSEL ASSISTANCE PROGRAM, TCAP MEMO No. 110, at 22 (February-March 1996). The author's point is simply that the courts and counsel should identify and utilize these factors in a more systematic fashion.

VII. A Prophylactic Solution to the Unreasonable Multiplication of Charges

The most effective restraint on the multiplication of charges may lie outside the military appellate courts or trial judiciary. Assuming that the best remedies for the unreasonable multiplication of charges are preventive and procedural,[149] the military justice supervisor may be the best person to review the charging decisions of an increasingly inexperienced body of trial counsel and thereby avoid unnecessary litigation at trial.[150] Conversely, the military justice supervisor is likely to be the best person to determine whether an intentional multiplication of charges is warranted in a given case and to assist the trial counsel in preparing to defend the charging decision before the military judge.[151] In any event, the potential effect of meaningful supervision and training by the military justice supervisor for the inexperienced trial counsel can hardly be exaggerated.

One way in which the military justice supervisor can facilitate the charging process, in addition to the supervision described above, is through the publication of "guidelines by which charging decisions may be implemented."[152] Such guidelines could assist inexperienced trial counsel in selecting charges, in ensuring equal treatment of similarly situated defendants, and in avoiding the consideration of an improper basis for selecting charges such as race, gender, or ethnicity.[153] Examples of potential topics for such guidelines include the simultaneous charging of conspiracy and the ultimate offense contemplated by the conspiracy, the use of federal or state offenses in conjunction with enumerated military offenses, and the use of intentionally duplicitous specifications.[154] The guidelines do not need to adopt a restrictive charging posture. For example, the *USAM* provides for charging the most serious offense encompassed by the conduct of the defendant and which is readily provable.[155] Multiple offenses may be charged as long as they "will significantly enhance

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149 *Cf.* SHELLENBERGER, *supra* note 48, at 124 (asserting that the "best remedies for double jeopardy violations are procedural and preventative").

150 For an excellent discussion of the charging decision from a supervisory perspective, *see generally* MAJOR [now Lieutenant Colonel] LAWRENCE J. MORRIS, KEYSTONES OF THE MILITARY JUSTICE SYSTEM: A PRIMER FOR CHIEFS OF JUSTICE, *ARMY LAW.*, Oct. 1994, at 15, 18. The practical and highly useful perspective of an experienced judge advocate on the charging decision can be found at TRIAL COUNSEL ASSISTANCE PROGRAM, TCAP MEMO No. 110, at 22 (February-March 1996).

151 MORRIS, *supra* note 150, at 18-19.

152 *See* NATIONAL PROSECUTION STANDARDS, *supra* note 142, at 132; ABA STANDARDS, *supra* note 22, Standard 3-2.5.

153 ABA STANDARDS, *supra* note 22, Standard 3-2.5 commentary, at 31.

154 This list is, of course, not intended to be exhaustive; the contents of such guidelines could vary from jurisdiction to jurisdiction.

155 USAM, *supra* note 144, § 9-27.310.

the strength of the government's case against the defendant."[156] However, the adoption of permissive guidelines would do little to reduce the likelihood of the unreasonable multiplication of charges, and may even be counter-productive to the intended outcome.[157] Regardless of the approach taken in a given jurisdiction, the publication of charging guidelines will add some certainty to the plight of the inexperienced trial counsel and serve as a useful vehicle for training new prosecutors.

VIII. A Modest Proposal for the President and the Military Appellate Courts

The focus of this article, as well as most treatments of multiplicity found in either case law or commentary, has until now been on the dialogue between military justice practitioners and the courts concerning how best to untie the knot of multiplicity and double jeopardy. This approach may be too narrow because it fails to address the role of the party whose unique powers under the UCMJ could have a significant influence upon the way in which this jurisprudential knot is undone — this previously neglected party is the President of the United States.

The President is the Commander-in-Chief of the Armed Forces[158] and has been empowered by Congress to prescribe the punishment that a court-martial may direct for an offense.[159] The President has traditionally promulgated rules concerning punishment consistent with federal practice under the multiple punishment doctrine, which generally prohibits multiple punishments for the same offense unless "each offense requires proof of an element

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156 *Id.* § 9-27.320.

157 There are those who contend that any guidelines purporting to limit prosecutorial discretion are of debatable utility, and few jurisdictions have in fact adopted such guidelines. ***See*** STANLEY Z. FISHER, IN SEARCH OF THE VIRTUOUS PROSECUTOR: A CONCEPTUAL FRAMEWORK, 15 ***Am.*** J. CRIM. L. 197, 205 n.36 (1988). Such critics usually argue that the problem of overcharging, to the extent that they acknowledge the problem exists at all, is best cured through a program of careful recruitment of prosecutors, comprehensive and ongoing training on the special conflicts that they are likely to encounter in the execution of their office, and reinforcement of the high ethical posture of the prosecutor through deemphasis on convictions as a measure of success, resolution of policy matters by the agency rather than by individual prosecutors, and fostering dialogue about ongoing cases. *Id.* at 255-60. Adequate treatment of this conflict in approach is, unfortunately, beyond the scope of this article.

158 U.S. CONST. art. II, § 2.

159 UCMJ art. 56. This power is particularly significant in light of the fact that the punitive articles typically provide no limitations upon the punishment that a court-martial may direct. ***See generally*** UCMJ arts. 78, 80-132.

not required to prove the other."[160] Further, the President has included in the *Manual for Courts-Martial* a description of lesser-included offenses to each offense under the UCMJ that are commonly considered by the courts to be based upon the relevant case law.[161]

One could conclude, however, that the President has the power under Article 56, UCMJ, to do more than just publish *descriptions* of the case law pertaining to punishments; the statute expressly provides that "[t]he punishment which a court-martial may direct for an offense may not exceed *such limits as the President may prescribe* for that offense."[162] The limits published by the President as an executive order and codified in the Rules for Courts-Martial,[163] therefore, have an independent statutory basis apart from the mere recitation of the opinions of the military appellate courts, so long as these rules do not provide less protection to the military accused than that afforded by relevant constitutional provisions.[164] Consequently, the President could identify combinations of offenses arising from the same act or transaction that could not be the subject of multiple punishments, and such a rule would be binding upon the courts and military justice practitioners alike.

In response to such an assertion of executive supremacy in matters relating to sentencing at courts-martial, some readers may note that "the constitutional power to define Federal civilian crimes and their punishments resides [only] with the Congress of the United States . . . [and a] similar constitutional power to define Federal military offenses and prescribe their punishments also lies with Congress."[165] Moreover, the President has no power to change or modify substantive criminal statutes.[166] "Construction of a substantive criminal statute so as to determine its proper ambit is uniquely within the province of courts . . . . Any apparent view of the President's [authority] to the contrary in the *Manual for Courts-*

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[160] *See, e.g.*, MCM (1951), *supra* note 35, para 76a.(8). For a more comprehensive treatment of the multiple punishment doctrine, see *supra* notes 24-29 and accompanying text.

[161] *See, e.g.*, United States v. U'eymouth, 43 M.J. 329. 342 (1995) (Crawford, J., concurring in the result).

[162] UCMJ art. 56 (emphasis added).

[163] MCM, *supra* note 20, R.C.M. 1003(c).

[164] *Cf. id.* app. 21, at A21-3 ("In this Manual, if matter is included in a rule or a paragraph, it is intended that the matter be binding, unless it is clearly expressed as precatory . . . . If the President has adopted a rule based upon a judicial decision or a statute, subsequent repeal of the statute or reversal of the judicial decision does not repeal the rule.").

[165] United States v. Teters, 37 M.J. 370, **373** (C.M.A. 19931, cert. *denied*, 114 S. Ct. 919 (1994).

[166] *E.g.*, Ellis v. Jacob, 26 M.J. 90, 93 (C.M.A. 1988); United States v. Asfeld, 30 M.J. 917, 927 (A.C.M.R. 1990).

Martial is no barrier."[167] Accordingly, the argument would conclude that the President must promulgate rules concerning punishment consistent with the decisions of the military appellate courts.

These incontrovertible assertions of law do not change the clear language of Article *56,* UCMJ, granting the President the power to prescribe punishment limits at courts-martial. In other words, Congress does possess a constitutional power to define federal military offenses and prescribe their punishments, and military appellate courts do have the unique responsibility of interpreting substantive criminal provisions of the UCMJ. However, it is at this point, in the words of the CAAF in *Weymouth,* that "military and federal practice begin to diverge."[168] The President *also* has broad powers—expressly granted by Congress and independent of the decisional authority of the military courts—to limit the sentences imposed at courts-martial.[169]

The President's authority to limit punishment imposed at courts-martial was recently considered by the CAAF in United States *v. Morrison.*[170] In a unanimous opinion, the CAAF first presumed that the offenses of missing movement through design and willful disobedience of the order of a superior commissioned officer were not the same offense, even though they were based upon the same act or transaction, "because they have different elements and neither is included in the other."[171] The CAAF then considered whether the President had prohibited separate punishments for the two offenses and concluded that he had not.[172] The President had promulgated Rule for Courts-Martial 1003(c)(1)(C) as a valid exercise of his power

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167 United States v. Anzalone, 41 M.J. 142, 147 **n.2** (C.M.A. 1994); **see** United States **v.** Gonzalez, 42 M.J. 469, 474 (1995) (noting that "it is beyond cavil that Manual explanations of codal offenses are not binding upon this Court").

168 United States **v.** Weymouth, 43 M.J. 329, 333 (1995).

169 The United States Supreme Court recently noted that "'The military constitutes a specialized community governed by a separate discipline from that of the civilian,' Orloff v. Willoughby, 345 U.S. 83, 94 (1953), and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline." Loving **v.** United States, 116 S. Ct. 1737, 1751 (1996). The Court noted that "it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority" in limiting punishments adjudged at courts-martial, *id.* at 1748, and ultimately affirmed the constitutionality of the military death penalty scheme while noting that "[tlhe President has thus provided more precision in sentencing than is provided by the statute, while remaining within statutory bounds." *Id.* at 1749. If the Supreme Court believes that it is constitutionally permissible for the President to promulgate rules under the authority of Article 56, UCMJ, that limit and regulate the imposition of the death penalty at courts-martial, one could reasonably conclude that the President could certainly also act to limit multiple punishments for offenses arising from the same act or transaction.

170 41 M.J. 482 (1995).

171 *Id.* at 484.

172 *Id.*

to limit sentences under Article 56, UCMJ, the court reasoned, that he had authorized separate punishments under the instant facts if each offense of which the accused had been found guilty required "proof of an element not required to prove the other."[173] The CAAF ultimately held that the offenses were separately punishable.[174]

The question that remains unanswered in the wake of the court's methodology in *Morrison* is whether the CAAF would have recognized the President's ability to limit punishments under these circumstances independently of the multiple punishment doctrine. That the court undertook the analysis at all points to the conclusion that the CAAF would have recognized such a limitation had it found one in a rule promulgated under Article 56, UCMJ. To conclude otherwise would render the CAAF's analysis in *Morrison* superfluous. As such, even the most ardent critic of presidential authority to limit punishments must acknowledge that the CAAF recognizes the potential for a valid exercise of that authority.[175]

IX. So What Does Alexander the Great Have to Do with All of This?

By now, the persistent reader may be wondering what Alexander the Great has to do with all of this? The answer lies in how Alexander dealt with the troublesome Gordian Knot. Curtius Rufus tells us. "For some time Alexander wrestled unsuccessfully with the hidden knots. Then he said: 'It makes no difference how they're untied,' and cut through all the thongs with his sword."[176] Similarly, the military justice system has for some time wrestled[177] with the contemporary problem of multiplicity. It may be time for someone to take a figurative sword to *our* Gordian knot, and the

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173 *Id.* (citing MCM, *supra* note 20, R.C.M. 1003(c)(1)(C)). Similar reasoning is found in *United States v. Oatney*, **41** M.J. 619, 629 (N.M. Ct. Crim. App. 19941, *reu. granted in part*, 42 M.J. 204 (1995).

174 It is informative to note that the court also looked for *judicial* prohibitions on separate punishments independent of the multiple punishment doctrine prior to reaching its holding. ***See*** *Morrison*, 41 M.J. at 484. This step is often overlooked by practitioners who focus their attention exclusively upon the elements of each offense and apply the so-called *Teters* Test; the multiple punishment doctrine is not the only limitation upon the ability of the courts to impose multiple punishments for offenses arising from the same transaction in military law. ***See*** ***e.g.***, United States **v.** Traxler, 39 M.J 476, 478-79 (C.M.A.1994) (considering the ultimate offense doctrine).

175 ***See*** *also* MCM, *supra* note 20, pt. IV, para. 16.e.(2) (limiting punishment for certain forms of disobedience that also violate other enumerated punitive articles).

176 Q. CURTIUS RUFUS, *supra* note 2, at 27.

177 Some might say unsuccessfully. ***See*** *generally* HERRINGTON, *supra* note 62, at 85 (concluding that the COMA had engaged in "wholesale disregard for constitutional law" in resolving multiplicity issues). *But cf.* YOUNG, *supra* note 62, at 175 (calling the current multiplicity methodology the "clear, consistent, and easy-to-apply standard for which military justice practitioners have been waiting").

authority best equipped to do that may be the President rather than the military appellate courts.[178]

The sword that the President might use would likely take a form similar to the Table of Commonly Included Offenses found in editions of the *Manual for Courts-Martial* prior to 1984.[179] A revised 'Table of Equivalent Offenses" would identify combinations of offenses that could not be the subject of separate punishment at court-martial if they arise from the same act or transaction. Offense combinations would include offenses that are multiplicious with one another by reference to their statutory elements, either because they are identical or one is necessarily included in the other,[180] and any other offense that the President decides under Article 56, UCMJ, should not be the proper subject of separate punishment.[181] The Table would be a rule promulgated under Article 56, UCMJ, and as such would be binding upon military justice practitioners and the courts.[182]

The primary advantage of such a revised table would be certainty for the courts and practitioners alike; counsel would know at the beginning of the court-martial process that the President has declined to separately punish certain combinations of offenses.[183]

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178 *See supra* notes 158-75 and accompanying text.

179 *See, e.g.,* MCM, *supra* note 20, appendix 12, at 537-40.

180 The popular saying is that "you can't get to multiplicity country without crossing lesser-included offense territory." United States v. Weymouth, 40 M.J. 798, 802 (A.F.C.M.R. 1994) (Pearson, J.), *aff'd,* 43 M.J. 329 (1995). Notwithstanding its rhetorical appeal, one could conclude that the saying actually has it backwards; all lesser-included offenses are multiplicious with their greater offense, but not all multiplicious offenses stand in the relationship of greater and lesser-included offenses to one another. As such, the saying should probably state that you cannot get to lesser-included offense territory without crossing multiplicity country.

181 *See, e.g.,* MCM, *supra* note **20,** pt. IV, paras. 16.e.(2), 106.c.(1).

182 The previous editions of the Table of Commonly Included Offenses were specifically published with the caveat that they were neither all inclusive or applicable to every case. MCM (1951), *supra* note 35, app. 12, at 537. Likewise, the military appellate courts accorded the Table "weighty consideration," but also did not hesitate to review the correctness of the President's conclusions. *See, e.g.,* United States v. Margelony, 14 U.S.C.M.A. **55,** 59, 33 C.M.R. 267, 271 (1963). A table of the sort proposed above would differ from these historical models in the fact of its binding nature. For a discussion of the potential role of the military trial and appellate courts under this proposed system, *see infra* notes 185-86 and accompanying text.

183 Judge Crawford, in her opinion concurring in the result in *Weymouth,* observed that the lesser-included offenses identified in virtually every paragraph in part IV of the *Manual* "serve [ ] as a bright line rule for determining lesser-included offenses. While this bright-line rule will not work in every case, it will apply in the great majority of cases, eliminating uncertainty, and avoid needless appellate review." *Weymouth,* 43 M.J. at 342. *But cf.* Young, *supra* note 62, at 175 (warning that following part IV of the *Manual* in determining lesser-included offenses "will give practitioners a false sense of security and risk reversal on appeal"). The proposed Table would have the additional virtue of identifying combinations of offenses, in addition to greater and lesser-included offenses, that could not be separately punishable if they arise from the same act or transaction, thereby further reducing the need for litigation of any issue except whether the offenses arose from the same act or transaction.

This certainty would in turn discourage the unreasonable multiplication of charges because counsel would know at the point of the charging decision that, regardless of exigencies of proof or overly concise drafting, the government could not obtain multiple punishments for certain combinations of offenses. The Table also may mitigate the potentially harsh effects of the system of consecutive sentencing currently in place at courts-martial.[184]

The primary criticism of such an approach would likely be that it invades the province of the courts in matters of construction and interpretation of criminal statutes. The courts would, however, retain a significant but more easily managed role under this proposal than currently practiced. Military judges would still scrutinize charge sheets for violations of the President's guidance and the unreasonable multiplication of charges, supervise the litigation of whether the offenses in question arose from the same act or transaction, and they would still resolve multiplicity issues arising under circumstances not described in the Table. The military appellate courts would continue to review the decision of the trial judiciary in these matters and would ensure compliance by the executive branch with the requirements of Article 36, UCMJ.[185] Because the Table could potentially reduce the incentive for prosecutors to engage in unnecessary multiplicity or otherwise unreasonably multiply the charges arising from the same act or transaction, the role of trial and appellate courts in multiplicity determinations would be greatly reduced, thereby freeing them to deal with other issues.[186]

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184 *Cf.* United States v. Teters, 37 M.J. 370, 379 (C.M.A. 1993)(Cox, J., concurring). Judge Cox wrote in his concurring opinion in *Teters* to note that there may be more rational methods of sentencing service members convicted of multiple offenses than that currently in place in the military justice system, and expressed the desire-hope that "the courts and the services, *and perhaps even the President* or Congress, can now direct some attention to what I consider a legitimate issue." *Id.* (emphasis added). The notion of a Table of Equivalent Offenses is offered merely as an effort to begin the requested dialogue on this important issue.

185 UCMJ art. 36.

186 One could, however, envision a more active role for the military appellate courts similar to that of federal courts under the Administrative Procedure Act. Pub. L. No. 404. 60 Stat. 237-44 (codified as amended in scattered sections of 5 U.S.C.). The President's limitations upon punishment at courts-martial published as the Table of Equivalent Offenses could still be subject to judicial review to ensure that the Table is not: arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(A)-(D).

X. Conclusion

The law of multiplicity is a challenging area of military practice that has been greatly simplified in a series of decisions by the CAAF.[187] In United States *v. Teters,*[188] the court held that in the absence of a clear indication of contrary legislative intent, counsel may presume that Congress intended multiple offenses arising from the same act or transaction to be separately punished if the elements of each offense require proof of a unique fact.[189] In United States *v. Foster,*[190] the CAAF held that an offense arising under the General Article may be the same offense as one arising under an enumerated article; all enumerated offenses have an implicit element of either prejudice to good order and discipline or discredit to the armed forces and as such may stand in an appropriate case as either a greater or a lesser offense to another offense arising under the General Article.[191] Finally, the CAAF held in United States *v. Weymouth*[192] that the elements to be considered in multiplicity determinations include not only the statutory elements but those required to be alleged in the specification.[193]

The military appellate courts must now clarify the meaning and effect of the CAAF's decision in Weymouth. The courts should, at the earliest appropriate opportunity, reaffirm the continued vitality of the statutory elements test for resolving multiplicity issues announced in Teters and limit the applicability of the pleadings-elements test to those military offenses that are not exclusively the product of statutes.[194] It also is important that the military appellate courts provide a more systematic means of determining whether a given multiplication of charges arising from the same act or transaction is unreasonable. Among the potential sources for a methodological framework are the ethical standards applicable to the prosecution function and the Principles *of* Federal Prosecution published by the Department of Justice.[195] Military justice supervisors can further reduce the likelihood of improper multiplicity and unreasonable multiplication of charges by publishing prosecutorial guidelines for their increasingly inexperienced trial counsel. Finally, the

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187 ***See infra*** notes 188-93 and accompanying text.

188 United States v. Teters, 37 M.J. 370 (C.M.A.1993), ***cert. denied,*** 114 S. Ct. 919 (1994).

189 ***Id.*** at 377.

190 United States v. Foster, 40 M.J. 140 (C.M.A. 1994).

191 ***Id.*** at 143.

192 43 M.J. 329 (1995).

193 Id. at 340.

194 ***See supra*** notes 87-110 and accompanying text.

195 ***See supra*** notes 121-48 and accompanying text.

President can take definitive action to remove the incentive for unreasonable multiplication of charges and reduce the need for multiplicity litigation by identifying those combinations of offenses arising from the same act or transaction that cannot be punished separately.[196]

Some may object to the fact that the military justice system must continue to wrestle with the issues of multiplicity described in this article at all, but such objections must be overruled. Multiplicity is, at its core, an issue of constitutional magnitude. It will be a matter of concern to the military justice system so long as the constitutional guarantees of due process and protection from multiple punishments for the same offense apply to those who serve their country in its armed forces. In any event, multiplicity *should* remain a matter of concern to courts and counsel alike because, in the words of Chief Judge **Cox, "A** fair result remains not only the objective, but indeed the justification of the military justice system."[197]

196 ***See supra*** notes 158-86 and accompanying text.

197 United States v. Foster, 40 M.J. 140, 144 n.4 **(C.M.A.** 1994).

OPERATIONAL LAW— A CONCEPT MATURES

LIEUTENANT COLONEL MARC L. WARREN*

Commanders should be counseled chiefly by persons of known talent; by those who have made the art of war their particular study, and whose knowledge is derived from experience; from those who are present at the scene of action, who see the country, who see the enemy; who see the advantages that occasions offer, and who, like people embarked on the same ship, are sharers of the danger. If, therefore, anyone thinks himself qualified to give advice respecting the war which I am to conduct, which may prove advantageous to the public, let him not refuse his assistance to the state, but let him come with me into Macedonia. He shall be furnished with a ship, a horse, a tent; even his traveling charge shall be defrayed. But if he thinks this is too much trouble, and prefers the repose of the city life to the toils of war, let him not, on land, assume the office of a pilot. The city, in itself, furnishes abundance of topics for conversation; let it confine its passion for talking within its own precincts, and rest assured that we shall pay no attention to any councils but such as shall be framed within our camp.

—Lucius *Paulus*
Roman Consul

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We are soldiers who happen to be lawyers.

—Major General Michael J. Nardotti
The Judge Advocate General, U.S. Army

I. Introduction

This article describes the context of contemporary military operations and suggests an operational focus for the Army Judge Advocate General's Corps. It endorses a broad definition of the maturing concept of operational law and examines selected legal issues in recent operations. Finally, it posits a vision for the Army Judge Advocate General's Corps of the future—a Corps based on operational law.

11. The Operational Context

The United States military routinely conducts extraordinary missions.[1] While existing fundamentally to fight and win the nation's wars,[2] the United States military's recent utility has been in diverse political-military operations,[3] which blur the distinction between combat and noncombat and between war and peace.[4] From Somalia to Macedonia, Northern Iraq to Haiti, and Bosnia to Liberia, these operations present issues of enormous political, military, and legal complexity. For better or for worse, the United States military is inexorably involved in what the United States military community jointly calls "military operations other than war," or MOOTW, a term first coined by the Army that made its official Department of Defense appearance in 1993 in *Joint Chiefs of Stuff*

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[1] Whether this is really a new phenomenon is debatable. The United States military has long conducted wide-ranging operations at home and abroad. Consider, for example, Operation Bluebat, the 1958 United States intervention in Lebanon (*see* ROGER J. SPILLER, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER No. 3, NOT WAR BUT LIKE WAR: THE AMERICAN INTERVENTION IN LEBANON (1981)) or Operation Power Pack, the 1965 intervention in the Dominican Republic (*see* LAWRENCE A. YATES, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER No. 15, POWER PACK: UNITED STATES INTERVENTION IN THE DOMINICAN REPUBLIC, 1965-1966 (1988)). What is novel, and the result of the end of the Cold War, is the recent United States participation in repetitive overseas operations authorized or directed by the United Nations (UN).

[2] 10 U.S.C. § 3062 (1988). *See* DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS iv (14 June 1993) [hereinafter FM 100-5, OPERATIONS]; DEP'T OF ARMY WHITE PAPER, DECISIVE VICTORY—AMERICA'S POWER PROJECTION ARMY 2 (Oct. 1994).

[3] General Maxwell R. Thurman frequently said, "All military operations are political-military operations."

[4] *See, e.g.*, General Gordon R. Sullivan & Lieutenant Colonel Andrew B. Twomey, *The Challenges of Peace*, PARAMETERS, Autumn 1994, at 4 (discussing "nuanced operations").

Publication 3-0, Doctrine for Joint Operations.[5] While doctrine and doctrinal terms for joint operations are in flux, changing in response to threats, technology, and objectives, throughout this article I use the current official Department of Defense term MOOTW to collectively describe the many and complex United States *joint* military efforts short of war.

Military operations other than war present numerous and diverse legal issues. Just as types of missions vary widely within MOOTW, so do the legal issues which pertain to them.[6] There is no "law of MOOTW."[7] There are, however, numerous laws and policies that impact—and frequently define—MOOTW.

As the Army faces new and sophisticated challenges, its leadership requires advisors who focus on concomitant political, military, and legal issues. To face these challenges, the Army merits a cadre of advisors who are competent in military and legal skills, participants in operations, and mindful of the depth—and limitation-of their roles.[8] The focus of the advisors is to lawfully facilitate mission accomplishment, thereby enhancing the versatility of already capable units to meet diverse mission requirements. That cadre is the Army Judge Advocate General's Corps. Their focus is operational law.

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[5] "MOOTW encompass the use of military capabilities across the range of military operations short of war." *See* JOINT CHIEFS OF STAFF PUBLICATION 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (16 June 1995) [hereinafter JOINT PUB 3-07, MOOTW]; JOINT CHIEFS OF STAFF PUBLICATION 3-0, DOCTRINE FOR JOINT OPERATIONS (9 Sept. 1993); FM 100-5, OPERATIONS, *supra* note 2, ch. 13.

[6] The operational diversity within MOOTW has caused the Army to revisit the issue of whether there should be any overarching reference to operations other than war (OOTW). *See* Message, Headquarters, US Army Training and Doctrine Command, DTG 2720162 Oct 95, subject: Commander TRADOC's Philosophy on the Term "Operations Other Than War" **(OOTW)** What to call OOTW is a tempest in a teapot—the military has always been involved in operations other than war. Suggestions on the successor to the term "OOTW" range from "small wars" to "operations short of war," and from "low intensity conflict" to, facetiously, "operations formerly known as operations other than war" to "stability and support operations." *See, e.g.,* Dep't of Army, Field Manual 100-20, Stability and Support Operations (1996) (Final Draft). A new *FM* 100-5, *Operations,* which must confront the issue, will likely not be published until 1997 or 1998. For analyses of the doctrinal and practical issues associated with overarching terminology, see Colonel Ann E. Story & Major Aryea Gottlieb, *Beyond the Range of Military Operations,* JOINT TASK FORCE QUARTERLY, Autumn 1995, at 99; Robert J. Bunker, *Rethinking OOTW,* MIL. REV., Nov.-Dec. 1995, at 34.

[7] However, *JOINT PUB 3-07, MOOTW,* identifies "areas requiring legal expertise." These include refugees, displaced and detained civilians, fiscal law, rules of engagement (ROE), psychological operations, civil affairs, medical support, local culture and government, international law and agreements, military and political liaison, claims, and contingency contracting. JOINT PUB 3-07, MOOTW, *supra* note 5, fig. IV-2.

[8] Lawyers advise and commanders command. Nevertheless, as Sir Francis Bacon wrote: "The greatest trust between man and man is the trust of giving counsel" *(quoted in* GRECG HERKEN, COUNSELS OF WAR (1985)).

III. Operational Law

In his seminal article on operational law, Colonel David Graham identified the discipline as "that body of law, both domestic and international, impacting upon legal issues associated with the planning for and deployment of US Forces overseas in both peacetime and combat environments."[9] Colonel Graham noted that operational law "transcends normally defined legal disciplines" and constitutes a "comprehensive, yet structured approach toward resolving legal issues evolving from the overseas deployment of US military forces."[10] Colonel Graham's definition, with slight modification, is repeated in the field manual on legal operations: "Operational law is the application of domestic, international, and foreign law to the planning for, training for, deployment of, and employment of United States military forces."[11]

The *Operational Law Handbook*, published by The Judge Advocate General's School, offers a more contemporary and comprehensive working definition of the discipline: "Operational law is that body of foreign, domestic, and international law which impacts specifically upon the activities of US Forces in war and operations other than war."[12] The School's definition of operational law is remarkably broad—and deliberately so. The role of the judge advocate in military operations since Operation Urgent Fury in 1983 (the crucible for the definition and practice of operational law) establishes the interdisciplinary and interprofessional depth and breadth of operational law.[13] From running the "weapons for cash" turn-in program in Grenada to investigating war crimes in Kuwait, from trying courts-martial in Saudi Arabia to advising detainee interrogators in Haiti, from participating in targeting cells in Somalia to sitting on

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9 Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age,* ARMY LAW., Jul. 1987, at 9.

10 *Id.*

11 DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS 5, 6 (Sept. 19911 [hereinafter FM 27-100, LEGAL OPERATIONS]. The term "legal operations" is a confusing misnomer. A more accurate title for the manual is *"Operational Law."*

12 THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1-1 (1996) [hereinafter OPERATIONAL LAW HANDBOOK]. The *Operational Law Handbook* is published each June and is available on the JAGC Electronic Bulletin Board Service and on the Joint Electronics Library (JEL) CD-ROM on Peace Operations (Joint Warfighting Center, Fort Monroe, Virginia, Dec. 1995).

13 Judge advocates were involved in military operations long before Grenada. *See, e.g.*, DEP'T OF ARMY, THE ARMY LAWYER: A HISTORY OF THE JAGC, 1775-1975 (1975); MAJOR GENERAL GEORGE S. PRUGH, DEP'T OF ARMY, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-1973 (1975) [hereinafter PRUGH, LAW AT WAR]; Colonel Ted B. Borek, *Legal Services During War,* 120 MIL. L. REV. 19 (1988).

joint military commissions in Bosnia,[14] judge advocates constantly expand the scope of the practice of operational law.

If the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice. Operational law exists to provide legal support and services to commanders and soldiers in the field. It is not a specialty,[15] nor is it a discrete area of substantive law. It is a discipline, a collection of all of the traditional areas of the military legal practice focused on military operations. Practicing operational law involves military justice, administrative law, claims, contract law, fiscal law, legal assistance, international law, and the law of armed conflict. Operational law also includes proficiency in military skills. It is the *raison d'etre* of the uniformed judge advocate. Every judge advocate must be an operational lawyer.[16]

This broad view of operational law is inclusionary, not exclusionary, and evolutionary, not revolutionary. It requires more of a thematic than a structural revision of the Corps. Our central focus must be to facilitate operations. Staff judge advocates, regional defense counsel, and other leaders must stress the legal and military roles of their judge advocates[17] and train their subordinates as soldier-lawyers in a joint, combined, and interagency environment.[18]

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[14] Major Peter Zolper & Captain Mike Isaaco, The Joint Military Commission—A Potential Decisive Point, CENTER FOR ARMY LESSONS LEARNED (CALL) NEWSLETTER, Jan.-Feb. 1996, at 8. Joint military commissions are specified under Article VIII of Annex 1A, Military Aspects of the Peace Settlement, of the Agreement on General Framework Agreement for Peace in Bosnia and Herzegovina (Implementing the Dayton Peace Accords), 15 December 1995, Republic of Bosnia and Herzegovina, Republic of Croatia, Federal Republic of Yugoslavia [hereinafter the Dayton Agreement], printed in THE JUDGE ADVOCATE GENERAL'S SCHOOL, MATERIALS ON OPERATIONAL LAW 107, 116(1996) [hereinafter MATERIALS ON OPERATIONAL LAW].

[15] *Cf.* Major Richard W. Thelin, Specialization: The Time is ***Now*** for Judge Advocates, MARINE CORPS GAZETTE, Feb. 1996, at 29.

[16] If every judge advocate is an operational lawyer, what is the role of the Chief, Operational Law, at corps and divisions? The chief, operational law, is the link between the Staff Judge Advocate (SJA) and other staff elements, primarily operations and intelligence, involved in the planning and execution of operations. The SJA is always the chief operational lawyer. The chief, operational law, is the SJA's representative. In the field, the chief, operational law, is collocated with the G3 operations section, typically in the plans element. In garrison, the chief, operational law, frequently works in the G3 section several days per week. Properly discharged, the duties of the chief, operational law, constitute more than a full-time job.

[17] Military schooling, staff rides, officer professional development sessions, and professional reading programs are key components of training. For military reading program suggestions, see COMBAT STUDIES INSTITUTE, BOOKS FOR THE MILITARY PROFESSIONAL (1995).

[18] See Colonel James W. Swanson & Colonel Charles J. Dunlap, Jr., *Staff Judge* Advocate for the Joint Task Force: Are *You* Ready?, 22:1 REPORTER 1. At a minimum, officers and noncommissioned officers should be aware of the concept of joint staffs and have access to the publications on the Joint Electronic Library (JEL) CD ROMs available from the Joint Warfighting Center, Fort Monroe, Virginia. A good primer on joint staffs is the Department of Defense's 1993 Armed Forces Staff College Publication *1*, The Joint Staff Officer's Guide.

Operations training should include legal noncommissioned officers and stress joint headquarters tactics, techniques, and procedures.[19]

Operational lawyers must be decathletes, not boxers.[20] They must be consummate generalists, well schooled in all aspects of this discipline. Substantive specialization, although necessary in some areas (for example, acquisition law), should continue to be the exception rather than the rule in the Corps.[21]

Versatility of the Corps' personnel enhances the versatility afforded by the Corps to the Army. As operations are increasingly executed by joint and interagency task forces and, in combined environments, judge advocates are likely to deploy as part of a composite legal support section. Because of the composite, complex nature of modern operations, judge advocates supporting combat support or combat service support units may be as likely to deploy as those assigned to combat units. Such was the case in Haiti, Somalia, and Rwanda. Soldier-lawyers must be physically fit and mentally prepared to deploy whether they are assigned to the Pentagon or to a division.

Army doctrine mandates the assignment of judge advocates to combat units and provides some constants concerning their location and mission. First, judge advocates will deploy as far forward as possible. The mission of the Judge Advocate General's Corps is "to support the commander on the battlefield by providing professional legal services as far forward as possible at all echelons of command throughout the operational continuum."[22] Within the discipline of operational law, judge advocates advise commanders on the law of armed conflict, and on other international and domestic law and

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19 Judge advocate sections also must establish internal standard operating procedures. Deployment checklists, smart books, job books, continuity books, and published reporting requirements are important; once deployed, a log or other record is essential. Deployment preparation and execution is addressed in the OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 14.

20 This attribute suggests flexibility, initiative, agility, and versatility. and is incorporated in Army doctrine. *See* FM 100-5, OPERATIONS, *supra* note 2, at 2-9.

21 Recognition of contracting and fiscal law issues and solutions is an attribute of the operational lawyer. Recent experience in limited war and MOOTW suggests that such issues will arise almost contemporaneously with the commencement of an operation. *See, e.g.*, CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, LESSONS LEARNED FOR JUDGE ADVOCATES 118 (11 Dec. 1995) [hereinafter HAITI LESSONS]. For a primer on contingency contracting, *see* Major Rafael Lara, Jr., *A Practical Guide to Contingency Contracting*, ARMY LAW., Aug. 1995. at 16; on fiscal law, *see* Contract Law Note, *Funding Issues in Operational Settings*, ARMY LAW., Oct. 1993, at 38.

22 FM 27-100, LEGAL OPERATIONS, *supra* note 11, at 1; the reference in the manual to "battlefield" can be read as "area of operations." The manual, premised on the Airland Battle Doctrine, predates the doctrinal concept of MOOTW.

policy which impact upon the activities of United States forces in war and MOOTW.[23]

Second, judge advocates will deploy with the lead elements of combat units. The field manuals governing the operations of the infantry division in the field provide a description of the SJA section in the rear, main, and assault command posts of the division.[24] The SJA of the 82d Airborne Division airlanded in Grenada with the division's assault command post in Operation Urgent Fury in 1983. The SJA parachuted into Panama with the division's assault command post in Operation Just Cause in 1989. Judge advocates are a key component of the advance party and main body in MOOTW.[25] A judge advocate deployed with the first rotation of soldiers in Operation Able Sentry in Macedonia in 1993. Presently, many judge advocates serve with the NATO Implementation Force (IFOR) in Bosnia.

Third, judge advocates will deploy with maneuver brigades and larger units.[26] Judge advocates participated in combat with brigades, regiments, and divisions in Operation Desert Storm and in

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[23] Advice on the law of armed conflict is a solemn responsibility of judge advocates, involving issues of law, regulation, policy, discipline, humanity, politics, and treaty obligations on the part of the United States. In no small measure, judge advocates in the field are an affirmation of the nation's intent to follow and enforce the law of armed conflict. Although the United States is not yet a party to Protocol I Additional to the Geneva Conventions of 1949, judge advocates provide a more comprehensive — and immediate — resource than contemplated by Article 82 of the Protocol (mandating legal advisors for commanders). See The 1977 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter Protocol I]. For an examination of the role of the legal advisor in this context, *see* William H. Parks, *The Law of War Adviser*, 31 JAG. J. 1 (1980); Matthew E. Winter, *"Finding the Law" — The Values, Identity, and Function of the International Law Adviser*, 128 MIL. L. REV. 1 (1990); Lieutenant Colonel Walter G. Sharp, Jr., *The Warfighting Role of the Marine Judge Advocate*, MARINE CORPS GAZETTE, Feb. 1996, at 18.

[24] DEP'T OF *ARMY*, FIELD MANUAL 71-100, DIVISION OPERATIONS 3-2 to 3-8 (16 JUNE 1993); DEP'T OF ARMY, FIELD MANUAL 71-100, DIVISION OPERATIONS 3-30 (approved final draft, 27 Oct. 1995) [hereinafter FM 71-100, DIVISION OPERATIONS]; DEP'T OF ARMY, FIELD MANUAL 71-100-2, INFANTRY DIVISION OPERATIONS TACTICS, TECHNIQUES, AND PROCEDURES 2-42, 2-61 to 2-84 (31 Aug. 1993) [hereinafter INFANTRY DIVISION TTP]. "Included in the personnel requirements for the G3 operations element is an SJA officer to inform the commander on legal ramifications of operations and COAs [courses of actions]. . . . The SJA element is a critical element in the assault CP [command post] in the early stages of the deployment." *Id.* at 2-83. *See also* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 1.

[25] INFANTRY DIVISION TTP, *supra* note 24, at 6-7.

[26] *See, e.g.*, DEP'T OF ARMY, FIELD MANUAL 100-16, SUPPORT OPERATIONS: ECHELONS ABOVE CORPS 7-11, 7-12 (16 Apr. 1985). "[Judge Advocate General's Corps] officers, legal clerks, and court reporters will be attached to each of the brigade-sized units . . . . All legal services, except legal assistance, are required by statute notwithstanding the type of combat, the intensity of the combat environment, and the time phase of combat. Legal assistance is required by regulation. . . . [L]egal support, however, must remain organic and dedicated to the command at all times." *Id.*

Panama and Grenada.[27] Judge advocates were on the ground and offshore in Somalia and Haiti. In what may have been a first, at least for an Army judge advocate, an attorney was aloft in the airborne command post for the Haiti operation.

The role of the deployed judge advocate has changed. No longer solely an advisor on discrete areas of law, the SJA increasingly serves in a broader capacity analogous to that of corporate general counsel. Subordinate judge advocates serve as operational law advisors to their commanders. All judge advocates provide legal and policy advice and serve as multifunctional personal and special staff officers.[28] In Haiti, for example, on the first morning of the operation, the SJA advising the United States forces commander participated in the first meeting between the United States commander and General Cedras.[29]

Within the command, judge advocates frequently serve as the "honest broker" or "sounding board" in matters other than those involving law and regulations. Particularly in deployed headquarters, judge advocates cannot wait for others to identify and staff legal issues; they must anticipate, identify, and resolve issues which arise in the course of operations outside the normal staffing process. Judge advocates should be as comfortable in the tactical operations center as they are in a courtroom and as versed in operational legal issues as they are in case law. **A** deployed, effective judge advocate both unburdens and empowers the commander, relieving the commander from unnecessary tasks and providing advice which enhances the capability of the unit.[30] Today'sjudge advocate is not

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[27] The presence of judge advocates near the actual fighting provoked comment dating back to the First World War:

> It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a 'snap'or for a 'silk stocking' position far in the rear of the actual fighting. The officers acting on the staff of The Judge Advocate General will be members of the actual fighting force, and, in the pursuit of duty, will be brought into the danger zone just as often as other specialized commissioned men, medical officers, for instance.

11 *AM.* J. INT'L L. 651 (1917).

[28] DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 2-3 to 2-9, 3-31, 3-32 (25 May 1984). Judge advocates often perform nonlegal duties during operations; *Army Regulation 27-1* cautions only that they should "as much as possible . . . perform only professional legal duties" and should not "perform any nonlegal duties . . . that would interfere with their primary assigned legal duties." DEP'T OF *ARMY,* REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 3-2c (3 Feb. 1995).

[29] The Combined Joint Task Force 180/XVIII Airborne Corps Staff Judge Advocate was Colonel, now Brigadier General, John D. Altenburg. The commander was Lieutenant General, now General, Henry H. Shelton.

[30] The acts of the judge advocate must always remain within the bounds of the law and conform to standards of professional ethics and responsibility. There is no combat or operational exclusion to professional responsibility; unless expressly autho-

"just the lawyer" but a key leader within the unit. In this regard:

> The qualities of a leader are not limited to commanders. The requirements for leadership are just as essential in the staff officer, and in some respects more exacting, since he does not have that ultimate authority which can be used when necessary and must rely even more than his commander on his own strength of character, his tact, and persuasion in carrying out his duties.[31]

IV. Selected Legal Issues

Recent experience suggests that legal issues concerning the mission and status of the force, rules of engagement (ROE), prisoners and detainees, indigenous civilians, and military discipline are particularly critical in MOOTW outside the continental United States involving United States forces equipped for combat.[32] Identification and orderly resolution of these and other legal issues can help enhance effectiveness, focus effort, and accomplish the mission. Judge advocates assist commanders by providing legally and militarily sound analysis: "[Tlhe **SJA** must be on the commander's squad from the very beginning of any operation."[33]

Solving the legal issues in operations requires analytical versatility and flexible thinking. Seldom are the issues rote or the solutions readily apparent. The "practice of law by analogy" is commonplace in operations outside the traditional ambits — and resultant legal structure — of "war," "international armed conflict," "internal armed conflict," or "occupation." Nontraditional operational and

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rized, the judge advocate's client remains the Army or, in the case of a joint or other executive agency assignment, the organization of assignment, not the commander or the unit. *See* DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT **FOR LAWYERS** (1 May 1992) (Rules 1.13 and 1.7, and comments thereto); OPERATIONAL LAW **HANDBOOK**, *supra* note 12, app. G, "Professional Responsibility."

31 General Matthew B. Ridgway, ***Leadership, reprinted in*** MILITARY LEADERSHIP: IN PURSUIT OF EXCELLENCE **43,** 51 (Robert L. Taylor & William E. Rosenbach, eds., 2d ed. 1992).

32 Contemporary operations present numerous legal issues which could be grouped in many ways. One means of grouping legal issues is "FAST J," found in the ***Operational Law Handbook, see*** OPERATIONAL LAW HANDBOOK, ***supra*** note 12, ch. 6. Designed as a shorthand method of operation plan and order review addressing major operations legal issues, the acronym stands for "Force" (ROE), "Authority" (to perform missions and tasks), "Status" (of the force and other persons encountered by the force), "Things" (buying, breaking, and blowing up), and "Justice."

33 Interview with General Maxwell R. Thurman at National Defense University Joint Operations Symposium, Washington, D.C. (**12** July 1994).

legal parameters create issues arising from the most basic of military concepts: the mission.[34]

A. *The Mission*

To paraphrase the Marine Corps *Small Wars Manual*, military operations other than war "are conceived in uncertainty, are conducted often with precarious responsibility and doubtful authority, under indeterminate orders lacking specific instructions."[35] Commanders often require assistance in defining the permissible scope of their mission. Coordinated and approved restated mission statements provide the most direct guidance to commanders. Similarly, approved and nested intent statements help ensure that all levels of command "stay within their lane" legally, fiscally, and tactically.

When concerned about whether contemplated tasks or actions are within the scope of the unit's mission, commanders and judge advocates should collectively review their mission statement.[36] If the action is not expressly authorized by the statement, they must consider whether it is inherently authorized. Reasonable action to protect the force is always authorized. In Somalia, United States forces permissibly improved roads under the inherent authority to protect the force—convoys and patrols that would have been placed at greater risk on dangerous, worn roads. More problematic are actions undertaken by implication. In Haiti, for example, United States forces were directed to "enhance security and restore civil order." This mission statement served as the implied basis for

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34 The mission is "the primary task assigned to an individual, unit, or force. It usually contains the elements of who, what, when, where, and the reason therefor, but seldom specifies how." DEP'T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND SYMBOLS 1-47 (21 Oct. 1985). ***See also*** FM 100-5, OPERATIONS, *supra* note **2.** at 6-6: "The mission is the commander's expression of what the unit must accomplish and for what purpose."

35 UNITED STATES MARINE CORPS, SMALL WARS MANUAL 9 (1940). The *Small Wars* ***Manual,*** now out of official print but available from Sunflower University Press. Manhattan, Kansas. is a must-read for operational lawyers. It is proof of Hamilton's assertion that. "All who have gone before us are not fools." In addition to traditional military topics like tactics and logistics, it discusses psychological warfare, the relationship with the State Department, methods of pacification, recruiting and training native troops and police, detaining and disarming civilians, establishing military government, supervising elections, applying legal principles to situations short of war, and withdrawal.

36 It may be possible to refine a proposed mission statement to give the command the clear capability to accomplish the intended mission. A task specified or implied from a mission statement is both proper for the force to accomplish and a proper, easily justified expenditure of Operation and Maintenance (O&M) Appropriations. Conversely, some latitude in the mission statement is essential to afford the commander operational flexibility. There is no cookie cutter solution; the SJA must participate in the mission analysis, conduct a legal estimate of the situation, and assist the commander as part of a synchronized staff. ***See generally*** DEP'T OF ARMY, COMMAND AND GENERAL STAFF COLLEGE, STUDENT TEXT 101-5, COMMAND AND STAFF DECISION PROCESSES (20 Feb. 19951.

Operation Light Switch, wherein operational and maintenance funds were used to make minor, short-term repairs to the Port-au-Prince municipal power plant.[37] The restoration of electricity in a city clearly enhances security and promotes order. Similarly, the authority to detain civilians for security and order is fairly implied from mission statements which contain commands such as "restore order" or "create a secure environment."

Missions can change. Although judge advocates should assist their commanders in avoiding "mission creep,"[38] whether a mission "crept" or changed may be a matter of intent, result, and perspective. Changes in mission can be deliberate, as in phases, or contingent, as in branches and sequels. Missions and orders are dynamic; they will likely be modified by fragmentary orders (FRAGOs). Judge advocates can make a valuable contribution in their commands by assisting in the planning for sequels involving postcombat stability and support and civil-military operations.[39]

Beyond the content of the mission statement, ascertaining the proper scope of a mission is at times complicated by the inherent vagaries of the term "MOOTW." What constitutes a "MOOTW mission?" What is a "MOOTW environment?" What is a "MOOTW trained and ready force?" Judge advocates may be tempted to look for "the law of MOOTW."[40] They must ignore that temptation. While there may be some constants, tenets, or principles associated with MOOTW, they are, like the principles of war or tenets of Army operations, only generalities. Conversely, the "laundry list" of MOOTW

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[37] This is an area in which judge advocates must step forward to protect their command and the Army. "Force protection" is not a subterfuge for actions that should be funded by other means, such as the Economic Support Fund (Foreign Assistance Act §§ 531-535d, 22 U.S.C. §§ 2346-2346d), specifically, or the Foreign Assistance Act programs, generally. A key indicator that O&M funds may be improper for a contemplated project is that the idea for the project arose not in command or operations channels but with the Ambassador or United States Agency for International Development (USAID) director or in the civil-military operations element. Judge advocates also should consider whether the contemplated expenditure is long term or if the result is permanent. If in doubt about the contemplated project, the judge advocate should raise the issue, forward an inquiry, and document the response.

[38] "Mission creep" is a phenomenon where parties, in furtherance of their political agendas, attempt to expand the limits of a commander's mission without approval of the National Command Authority (NCA). *See* DEP'T OF *ARMY,* FIELD MANUAL 100-23-1, MULTISERVICE PROCEDURES FOR HUMANITARIAN ASSISTANCE OPERATIONS 3-1, 3-2 (31 Oct. 1994) [hereinafter FM 100-23-1, HUMANITARIAN ASSISTANCE].

[39] *See generally* John T. Fishel, *The Murky World of Conflict Termination: Planning and Executing the 1989-90 Restoration of Panama and The Middle East, War's End: A Strategic Concept for Post-Conflict Operations, reprinted in* DEP'T OF ARMY, COMMAND AND GENERAL STAFF COLLEGE, THEATER OPERATIONS (Jan. 1996), suggesting that postconflict operations, including the discharge of legal obligations toward indigenous civilians and rehabilitation of legal and governmental structures, were not integrated into the respective campaign plans for Panama and the Gulf War.

[40] *See supra* notes 6, 7, and related text.

can present a trap for the unwary, suggesting that missions can be readily categorized; while this is possible, it is unusual.[41] More likely, operations will be a combination of MOOTW, occurring either concurrently or consecutively. Operations may even be a combination of MOOTW and war. When faced with a particular mission, however characterized, judge advocates should instead ask, "Is the mission primarily dominated by combat or noncombat operations?" Put another way, the question could be phrased, "Is the operation dominated by lethal or nonlethal elements of combat power?"[42]

In operations primarily dominated by combat operations, the role of the judge advocate is significant, but traditional, and involves support in the areas governed by existing law, regulation, and doctrine.[43] In operations either dominated by, or evolving into, noncombat operations, the role of the judge advocate expands. Conflict termination activity, stability and support operations, and postconflict missions in general are expanding areas for judge advocates. Repetitive issues in these contexts are indigenous weapons control and confiscation policies,[44] methods by which United States forces restore order,[45] the status of United States forces, and the reemer-

41 In 1994, Operation Support Hope in Rwanda, for example, was crafted with specific success criteria and measures of effectiveness, a clear end state, purely defensive ROE, and a limited, explicitly stated mission. It was a pristine "humanitarian assistance operation."

42 The word "dominated" is used deliberately. Operations may involve combat and noncombat activity. Under this model, Somalia was a noncombat operation in that it was "dominated" by noncombat activity and "dominated" by nonlethal elements of power. Nevertheless, combat was certainly an integral part of the United States military experience in Somalia. Similarly, UN and NATO missions in Bosnia are noncombat operations, but combat activity (NATO airstrikes) set the conditions for the Dayton Agreement and subsequent NATO IFOR mission.

43 These areas include, for example, the law of armed conflict and the Uniform Code of Military Justice (UCMJ), various implementing directives and regulations, and FM 27-100, LEGAL OPERATIONS, *supra* note *11.*

44 Weapons confiscation, control, and buyback policies can be extremely complicated. In Grenada, judge advocates actually ran the weapons and explosives turn in and buyback operation. Weapons buyback in Panama led to an investigation concerning funding for, and disposition of, weapons. Judge advocates must distinguish weapons "buyback" or "incentive" programs from confiscation. In contemplating any such policies, judge advocates should consider the realistic threat to the force, the threat to law-abiding citizens if they are disarmed, the law and culture of the society regarding weapons, the possibility of creating a weapons black market, and the likelihood of success. ***See,*** *e.g.,* Colonel F.M. Lorenz, *Law and Anarchy in Somalia,* PARAMETERS, Winter 1993-94, at **27,** 30.

45 The means to accomplish a mission range from the inherent authority of United States forces to more specific action such as that taken in Operation Urgent Fury in Grenada. After the combat phase of that operation, the emerging Grenadian government was faced with limited police capability and rampant lawlessness. Among other problems, with the breakdown of authority during and after the combat phase, inmates escaped from the island's prison and helped themselves to the ample supply of weapons strewn about the island. The Governor-General declared a state of emergency and, pursuant to his emergency powers, issued a "Preventative Detention Ordinance" which authorized "United States Forces officers and Military Police" to enforce Grenadian law.

gence and training of local police and governmental structures.[46]

Judge advocates must appreciate the political-legal context of operations.[47] At a minimum, they must understand the articulated legal basis for an operation.[48] Questions concerning the applicability and effect of the War Powers Resolution[49] are rote, but inevitable. The content and meaning of applicable UN Security Council resolutions and the impact of Presidential Decision Directive 25[50] are key issues in establishing the context of peace operations authorized or directed by the UN. On the ground, political-legal factors are no less important. Judge advocates must understand the role of the country team.[51] The senior judge advocate on a contingency operation should

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[46] Police training is an issue associated with virtually every operation. From 1981 to 1996, the United States military was prohibited by law from expending Foreign Assistance Act (FAA) funds to train or advise nonexempted foreign police in law enforcement functions (Foreign Assistance Act § 660(a), 22 U.S.C. § 2420(a)), but a broader prohibition existed by policy and tradition. In Somalia, United States forces assisted the UN in training local police only after a presidential authorization effectively exempted the training from the FAA. Absent such authority, only limited interoperability and compatibility training and liaison and joint patrol activity could be appropriately accomplished for force protection and mission objective reasons in stability-type operations. However, in 1996 the National Defense Authorization Act amended FAA § 660 to, among other things, expressly permit the United States military to provide assistance to reconstitute civilian police authority and capability in the postconflict restoration of host nation infrastructure and to provide professional public safety training, including training in human rights, the rule of law, anticorruption, and the promotion of civilian police roles that support democracy. More detailed training on law enforcement and criminal investigation subjects are within the purview of the Department of Justice's International Criminal Investigation and Training Assistance Program (ICITAP). Judge advocates have long had a role in assisting governments reestablish or improve judicial, penal, justice, and police institutions.

[47] As a general starting point, judge advocates should be familiar with the content of the current National Security Strategy and the National Military Strategy, salient extracts of which are located in the OPERATIONAL LAW **HANDBOOK,** *supra* note 12, ch. 2.

[48] For general information on the bases of intervention, ***see*** RICHARD HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR **WORLD** (1994).

[49] 50 U.S.C. §§ 1541-48 (1988 & Supp.).

[50] The White House and the National Security Council, Presidential Decision Directive/NSC 25, subject: Reforming Multilateral Peace Operations (May 1994).

[51] The country team is the means by which the Chief of Mission (Ambassador) ensures interdepartmental coordination among key members of the United States diplomatic mission. Its membership varies but frequently includes the Political Counselor (often third in command of the mission after the Deputy Chief of Mission and Ambassador); the Defense, Commercial, Agricultural, and Treasury Attaches; Directors of the USAID, USIS, and Peace Corps; and the chief of the Security Assistance Office. The United States forces commander is not a member of the diplomatic mission or country team but is typically welcome at country team meetings. ***See*** 22 U.S.C. § 3927; ***see*** DEP'T OF DEFENSE, JOINT PUBLICATION 3-07.1, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN INTERNAL DEFENSE, ch. 2 (20 Dec. 1993); DEP'T OF *ARMY,* FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS, ch. 14 (11 Jan. 1993); United States Foreign Service Institute, ***The Team: The Ambassador Sets the Pace*** 1 (undated 3 page information paper widely distributed to individuals receiving foreign service training).

attend country team meetings with, or for, the commander whenever practicable. All judge advocates should appreciate that the Departments of State and Defense do not necessarily have identical (or even parallel) agendas in a particular operation, and that domestic, international, and "host nation" politics are important considerations, particularly in MOOTW.[52]

Much has been written about peace operations[53] and the distinctions between "peacekeeping"[54] and "peace enforcement."[55] While the distinctions are critical to the international lawyer or politician, the terminology differences among missions are not as important to the soldier on the ground. The soldier—and his commander—are more properly concerned about the following questions:

- Who is in charge?
- What is the mission?
- Where is my sector, position, or zone?
- When do we use force (what are the ROE)?
- Why are we here? How do we know when we are done (what is the objective and end state)?

Peace and humanitarian assistance operations present particular challenges to commanders and judge advocates. In addition to the issues associated with all military operations, peace operations often produce complex questions concerning mission and legal context; ROE; status, authority, and protection of the force; and logistics. In both peace and humanitarian assistance operations, the presence of international organizations (IOs) and governmental

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[52] [P]olitical objectives drive military decisions at every level from the strategic to the tactical. All commanders and staff officers must understand these political objectives and the impact of military operations on them. They must adopt courses of action which legally support those objectives even if the courses of action appear to be unorthodox or outside what traditional doctrine had contemplated.

DEP'T OF ARMY, FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW-INTENSITY CONFLICT 1-5 (5 Dec. 1990).

[53] See generally DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (30 Dec. 1994) [hereinafter FM 100-23, PEACE OPERATIONS]. The manual is a "big picture, broad brush" reference which contains a chapter on legal considerations discussing ROE, terms of reference, and status of forces issues.

[54] Judge advocates deploying on a peacekeeping mission should review the materials on the JEL Peace Operations CD-ROM, supra note 12, paying particular heed to the Joint Task Force Commander's Handbook *for* Peace Operations and Joint Publication **3-07.3,** Joint Tactics, Techniques, and Procedures for Peacekeeping Operations. If embarking on a mission as or with UN peacekeepers, see also INTERNATIONAL PEACE ACADEMY, PEACEKEEPER'S HANDBOOK (1984) [hereinafter PEACEKEEPER'S HANDBOOK].

[55] See FM 100-23, PEACE OPERATIONS, supra note 53, at 6.

organizations (GOs),[56] and nongovernmental organizations (NGOs) and private volunteer organizations (PVOs),[57] can establish, complicate, or hinder the mission of the deployed force. In any event, the judge advocate will provide advice concerning the command's support to, and authority over, IOs, GOs, NGOs, and PVOs.[58] The judge advocate, possessing legal, cultural, and negotiating skills, has a key role in supporting the civil-military operations center (CMOC).[59]

In UN operations, regardless of their mission characterization, judge advocates must understand the international and domestic governing authority, the mandate, and the terms of reference (TOR).[60] Simply stated, governing authority is granted by applicable UN Security Council Resolutions (UNSCRs) and the domestic law of the nations contributing forces to the operation. The mandate is expressed by UNSCR and states the broad mission, political objective, and desired end state.[61] The TOR is effectively the contract between the UN and countries contributing forces to an operation.[62] The TOR are extremely important; the document states the mission, structure, organization, command and logistical relationships, support requirements, and funding of the force. Judge advocates must appreciate the roles of UN civilians, particularly the Special Representative to the Secretary General (SRSG), who is to UN

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56 The United States Agency for International Development (USAID) Office of Foreign Disaster Assistance (OFDA) Disaster Assessment and Response Team (DART) is a United States GO likely to be present in an operation. The DART *Field Operations Guide* is a superb pocket-size reference for judge advocates deploying on a humanitarian assistance (or any other) operation. *See* FIELD OPERATIONS GUIDE (OFDA, 1994) The UN High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC) are examples of IOs.

57 Nongovernmental organizations are "predominantly European national or international, nonprofit citizen's voluntary organizations." Private volunteer organizations are "private US based, nonprofit organizations involved in humanitarian efforts." FM 100-23-1, HUMANITARIAN ASSISTANCE, *supra* note 38, at 1-1, 1-2. Lists of the most active NGOs and PVOs are published in *FM* 100-23-1, *Humanitarian Assistance,* and *FM 100-23, Peace Operations. Supra* note 53; and the OPERATIONAL LAW HANDBOOK, *supra* note 12. Many of the organizations register with the USAID, which publishes a yearly report and list entitled 'Volunteer Foreign Aid Programs."

58 For guidance, look to the mission statement and list of specified tasks and implied tasks. *See generally* DEP'T OF *ARMY*, PAMPHLET 700-15, LOGISTICAL SUPPORT OF UN PEACEKEEPING FORCES (1 May 1986); DEP'T OF ARMY, REG. 700-131, LOAN AND LEASE OF ARMY MATERIEL (15 Feb. 1985) (C1, 4 Sept. 1987); DEP'T OF ARMY, UNIT SUPPLY UPDATE, 2-14 (23 Feb. 1994).

59 For information on the CMOC (now often termed the Civil-Military Cooperation Center), and on the closely related Humanitarian Operations Center (HOC), *see* FM 100-23-1, HUMANITARIAN ASSISTANCE, *supra* note 38, chs. 3, 4.

60 Of course, UN operations present a host of legal issues. *See generally* LIEUTENANT COLONEL WALTER G. SHARP, JR., UNITED NATIONS PEACE OPERATIONS (1996).

61 A sample mandate is in FM 100-23, PEACE OPERATIONS, *supra* note 53, annex B.

62 A sample TOR document is located in *FM* 100-23, *Peace Operations. Supra* note 53, annex A.

forces what the United States Ambassador is to United States forces overseas and to the Chief Administrative Officer (CAO).[63] Attention to logistical support, resource management, and property accountability details are important in a UN operation.[64]

B. Status of the Force

Any overseas mission requires determining the legal status, rights, and privileges of the force and its members. In some instances, this determination is simple and certain; in others, it is difficult and ambiguous. Judge advocates addressing the issue should first ascertain whether any existing agreement applies to the operation.[65] If no agreement applies, then judge advocates should consider whether one is necessary. No agreement is necessary if United States forces are engaging in combat against, or occupying, what would otherwise be the "receiving state;" similarly, no agreement is necessary without a "receiving state."[66] In these instances, "the Law of the Flag"[67] applies, and the United States retains exclusive jurisdiction over its forces.[68]

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[63] The CAO is the principal administrative and budget advisor to the UN Head of Mission.

[64] ***See*** DEP'T OF ARMY, PAMPHLET 700-31, HANDBOOK FOR PEACE OPERATIONS (A LOGISTICS PERSPECTIVE) (1 July 1994), which discusses logistics organization, structure, and procedures. Chapter VI, UN Cost Reimbursements and associated annexes are of particular importance to judge advocates as they cover in and out surveys. write off of equipment, and funds calculations.

[65] *Although Treaties in Force (T.I.F.), United States Treaties (U.S.T.),* and *Treaties and Other International Acts Series (T.I.A.S.)* are excellent academic references; the best source of information is the unified command having geographic responsibility for the country at issue and, if United States forces are already in country, the legal advisor for that force. Reference texts are often outdated, do not contain classified agreements, and cannot relate the ground truth concerning the actual implementation of an agreement by a country or its political subdivisions.

[66] In Somalia, for example, there was no legitimate national government with which to conclude any agreement concerning the status of the force; there was instead only a political vacuum.

[67] The "Law of the Flag," which traces its lineage in American jurisprudence back to *The Schooner Exchange v. McFadden,* 11 U.S. (7 Cranch) 116 (1812), and *Coleman v. Tennessee,* **97** U.S. 509 (18781,has two components of relevance to judge advocates. The first is that a force can bring its own law into foreign territory (the concept of extraterritoriality, which is inherent in the UCMJ); the second is that the force and its personnel are, in certain circumstances, immune from the exercise of jurisdiction by the foreign sovereign. The thrust of case law and commentators since the 1950s has been to limit the circumstances of immunity. *See generally* DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE 11-1 (1 Sept. 1979).

[68] While academics conclude that the Law of the Flag is a discredited or obsolete concept in international law, it is alive and well in fact and practice. Although it is true in modern law that consensual entry does not guarantee legal immunity, there are plainly situations in which the United States will not allow its forces to be amenable to local law but subject only to the extraterritorial application of the UCMJ and international law. In addition to combat and occupation, and operations conducted in a political vacuum, the Law of the Flag also may apply as a "default" in MOOTW which are "near-combat" or "near-occupation" operations. Two examples are Operations Provide Comfort (northern Iraq) and Uphold Democracy (Haiti). In both operations, the United States obtained a "waiver of jurisdiction" from the "receiving state;" however, the waivers were superfluous concessions to a foregone conclusion.

Two situations are more problematic. The first occurs when United States forces are present with the consent or acquiescence of the receiving state, without benefit of any status of forces agreement. The second occurs in postconflict situations when the United States is not an occupier and local governmental structures, particularly police and judicial institutions, are beginning to function. Both situations require some determination of the status of the force. Both require coordination with the **geographically-responsible** unified command and the United States Chief of Mission (Ambassador). Those negotiating status (and other international) agreements must act with requisite legal, procedural, and substantive authority.[69]

Judge advocates have been deeply involved in determining the status of United States forces in recent operations. Typically, United States forces are granted the status "extrapolated"[70] from an already existing agreement (which, by its terms, does not apply to the size, composition, or size of the force at issue), or the United States forces are granted privileges and immunities analogous to those conferred on the administrative and technical staff of missions (embassies).[71] The result under either approach is to give United States forces full immunity from receiving state criminal laws and limited immunity from civil jurisdiction. In Grenada, as combat ended and government functions reemerged, United States forces were granted such immunity through an exchange of notes.[72] In Kuwait, United States forces were initially and unilaterally granted complete immunity. During Operation Desert Storm, Saudi Arabia extrapolated an earlier limited agreement to apply to arriving United States forces. In the NATO IFOR mission, the Dayton Agreement addresses the status of the force in Bosnia. The new Partnership for Peace (PFP) status of forces agreement governs the status of the force in Hungary, which is the site of the intermediate staging base.

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69 ***See*** DEP'T OF DEFENSE, DIRECTIVE **5530.3,** INTERNATIONAL AGREEMENTS (11 June 1987)(C1, 18 Feb. 1991); DEP'T OF ARMY, REG. **550-51,** AUTHORITY AND RESPONSIBILITY FOR NEGOTIATING, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS (1 May 1995); ***see generally*** OPERATIONAL LAW HANDBOOK, ***supra*** note **12,** ch. **3.**

70 "Extrapolated," as used in this context, is a term coined in the Operational and International Law Department of The Judge Advocate General's School, United States Army, Charlottesville, Virginia, which has found its way into scholarly literature. ***See, e.g.,*** Major Brian H. Brady, ***The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?,*** ***ARMY*** LAW., Jan. 1995, at 14.

71 Administrative and Technical Staff Privileges and Immunities flow from Article 37 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, **22** U.S.T. **3227,** T.I.A.S. **7502,** 500 U.N.T.S. **95.** Often termed "Admin. & Tech. P. & I.," the status affords immunity from receiving state criminal jurisdiction and civil immunity for acts performed within the scope of duty. Typically, members of the Force do not enjoy "Admin. & Tech. P. & I." because they are not on the mission staff rather, they enjoy an analogous status under a specific agreement.

72 ***See*** OPERATIONAL LAW HANDBOOK, ***supra*** note **12,** ch. **3.**

Status of forces issues can be complicated in UN operations. On the one hand, forces committed to a traditional peacekeeping mission directed by the UN generally can rely on the consent of the receiving state as well as express or implied agreement about the privileges and immunities of the peacekeeping force. An express agreement may be concluded between the UN mission and the receiving state, often following the terms of "the UN Model Status of Mission/Status of Forces Agreement."[73] An implied understanding can flow from the terms of Articles 104 and 105 of the UN Charter and, by analogy, from the Convention on the Privileges and Immunities of the UN.[74] In any event, the nature of a true peacekeeping mission portends little real difficulty concerning the status of the peacekeeping force.

On the other hand, in a mission which does not fit within traditional peacekeeping, or where the receiving state is not fully committed to the success of the mission, reliance on agreements by implication is folly. Not only must judge advocates strive to obtain explicit agreements which address both legal and military issues, they must anticipate variance between "legal truth and ground truth." They must recognize the reality that a receiving state may be unable or unwilling to enforce compliance with agreements among its political subdivisions;[75] conversely, the receiving state may insist on strict interpretation of the parties and content of an agreement.[76] The negotiation and application of status of forces, and other international agreements, in modern operations requires sagacity born of political, military, and legal experience.[77]

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[73] The "UN Model SOFA is reprinted in *id.*, ch. 3. It is useful in two respects. It is an accepted model for concluding a SOFA in a particular operation, and it may be used as the basis for the behavior of the parties in the absence of an express agreement.

[74] Feb. 13, 1946, 21 U.S.T. 1419, T.I.A.S. 6900. The status granted by the Convention is often termed "Expert on Mission" status. ***See also*** PEACEKEEPER'S HANDBOOK, *supra* note 54, at 361.

[75] Such was the case during UN Protection Force (UNPROFOR) operations in Bosnia, where political subdivisions routinely ignored express or implied agreements.

[76] In Haiti, the Aristide government not only insisted on a tailored SOFA (not being content with simple SOFAs utilized in similar prior operations), but on three specific and diverse SOFAs with the various visiting forces in the country. Accordingly, the first SOFA, applicable to the Multinational Force (MNF), was not concluded until 10 December 1995, and two separate status agreements were required to respectively govern the UN Mission in Haiti (UNMIH) and United States forces not part of the MNF or UNMIH. ***See*** HAITI LESSONS, *supra* note 21, appendices O, P, Q.

[77] In Bosnia, United States Brigadier General Patrick O'Neal pragmatically demonstrated his understanding of the freedom of ingress and movement granted to IFOR under the Dayton Agreement when he was confronted at the border by a Bosnian militiaman demanding his passport. As he walked past the militiaman and into Bosnia, he pointed at his soldiers' rifles and said, "That's our passport." Thomas K. Ricks, *U.S. Brings to Bosnia Tactics That Tamed Wild West,* WALL STREET J., Dec. 27, 1995, at 7.

Claims play a significant role in operational law. Prompt and efficient processing of deployed soldiers' claims can have a positive impact on morale. Payment of indigenous citizens' claims enhances civilian support of the force. Military operations other than war can present an unusual context for claims because of the blurred distinction between combat and noncombat operations, with resultant uncertainty over compensation for the use, taking, or damage of civilian property.[78] Further, claims processing in MOOTW may be complicated by other UN, multilateral, and host nation claims authorities.

Judge advocates should be mindful that, despite frequent political and economic arguments to the contrary, the United States does not pay claims for combat damage under the Foreign Claims Act.[79] Absent express authority and funding, the United States Armed Forces claims program is not an instrument of economic recovery.[80] Similarly, the program is not a contracting substitute. It is, however, a powerful tool to maintain the goodwill of the civilian populace; accordingly, United States forces should be cautious about relying on the often ponderous and cumbersome claims programs of the UN or other authorities. Notwithstanding assertions that other programs are in place, United States forces should always maintain the capability to adjudicate claims in the field.

C. *Rules of Engagement*

Rules of engagement are a critical component of disciplined operations,[81] particularly in MOOTW where political considerations

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[78] Requisition, seizure, and confiscation are terms of legal significance and acts typically reserved for the battlefield or "enemy or former territory." ***See*** DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 148-56 (18 July 1956)(C1, 15 July 1976) [hereinafter FM 27-10, THE LAW OF LAND WARFARE]. Nevertheless, even in MOOTW dominated by noncombat activities (particularly where authorized under Chapter VII of the UN Charter), reason and practice suggest that weapons may be confiscated or seized for force protection purposes, and public property may be seized at least at the beginning of an operation in order to receive and consolidate, and establish lodgements for the force. Concerning practical and legal aspects of seizure (and other "combat acquisition practices") ***see*** OPERATIONAL LAW HANDBOOK, ***supra*** note 12, ch. 9.

[79] 10 U.S.C. § 2734 (1988 & Supp.); DEP'T OF ARMY, REG. 27-20, CLAIMS, ch. 10 (15 Feb. 1989).

[80] In Grenada, claims for combat damage were not paid under the initial Army claims program. A later and separate program, funded by USAID and executed by Army judge advocates pursuant to a Participating Agency Servicing Agreement (PASA), paid certain combat damage claims which had been originally denied by Army Foreign Claims Commissions.

[81] Discipline is a characteristic of Army operations. FM 100-5, OPERATIONS, ***supra*** note 2, at 2-3.

require the restrained and judicious use of force.[82] For the judge advocate, ROE may be the most important information pertaining to an operation. Judge advocates are increasingly involved in the drafting, distillation, and dissemination of ROE.

While much has been written on ROE at the theoretical and strategic levels, little doctrinal literature for land forces exists at the practical, operational, and tactical levels. Even the doctrinal definition of ROE, published by the Joint Chiefs of Staff (JCS), has little specific meaning to the soldier on the ground.[83] A better definition for the soldier is that ROE are the commander's standards for the use of force.

The JCS Standing ROE (SROE), which replaced the JCS Peacetime ROE (PROE) in 1994, provide standing rules and policy guidance from the National Command Authority to the unified command commanders-in-chief (CINCs).[84] The JCS SROE base document is unclassified, but the SROE include classified supplemental measures. Unclassified definitions of critical terms, such as "national self-defense,'' "unit self-defense,'' "collective self-defense," "hostile act," and "hostile intent,'' also are contained in the SROE.

The JCS SROE contain numerous improvements over the JCS PROE.[85] First, the SROE provide standing rules and policy that apply, unless superseded, in peacetime, transition to war, and wartime. Second, the SROE are permissive and realistic, not restrictive or prophylactic. Third, they govern the use of force not only in self-defense, but in mission accomplishment. Fourth, the SROE include, as additional standing ROE for specific areas of operational responsibility (AORs), ROE proposed by CINCs and approved by the JCS. Fifth, the SROE contain more robust supplemental measures, particularly for the ground forces, which may be activated either by

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82 Restraint and legitimacy are tenets of operations other than war (FM 100-5, OPERATIONS, *supra* note **2,** at 13-4) but are not restricted to OOTW. The United States showed great restraint in furtherance of political objectives in Operation Desert Storm, despite being operationally unimpeded by the enemy. For an example of an ill-conceived and needless use of restraint in the Vietnam War, *see* William H. Parks, *Rolling Thunder and the* ***Law*** of *War,* AIR U. REV., Jan.-Feb. 1982, at **4.**

83 JOINT CHIEFS OF STAFF PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS **(23** Mar. 1994) defines ROE as: "Directives issued by competent military authority which delineate the circumstances and limitations under which United States Forces **will** initiate and/or continue combat engagement with other forces encountered." Interestingly, the definitions of ROE contained in other doctrinal publications (many Army field manuals, for example) do not track the Department of Defense definition.

84 CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT FOR US FORCES (1 Oct. 1994).

85 For an excellent, succinct primer on the JCS SROE, *see* Colonel F.M. Lorenz, *Standing Rules* of *Engagement: Rules to Live By,* MARINE CORPS GAZETTE, Feb. 1996, at 20.

order of the JCS or on the request of any level of command and approval by the JCS. Significantly, commanders need not limit their requests to listed supplemental measures but may draft their own proposed ROE for approval by higher headquarters. Supplemental measures, whether or not invoked, never limit a commander's right and obligation to use force for unit self-defense. Sixth, the SROE provide guidance concerning ROE in combined (multinational) operations: ROE should be "common" but need not be identical among multinational partners.[86]

Judge advocates participated in the drafting and staffing process leading to the new SROE,[87] and play a continuing role in the implementation of ROE at the operational and tactical levels. Judge advocates assist commanders in several major respects relative to ROE:

(1) They provide advice to commanders concerning the effect and propriety of applicable or putative Supplemental Measures, frequently drafting proposed Supplemental Measures.

(2) They "distill" complex ROE provided by higher headquarters into simplified ROE, and into ROE extracts on pocket cards, for their units.[88] The "distillation" must be consistent with the ROE provided by the higher headquarters.

(3) They draft, in concert with the operations and intelligence staffs, complete ROE for a contingency operation. The ROE is then sent to higher headquarters for approval.

(4) They provide advice to commanders concerning the meaning, effect, implementation, and enforceability of ROE.

(5) They provide training assistance in preparing realistic scenarios and vignettes for commanders and soldiers to learn the ROE, and enhance the ability of commanders and soldiers to apply the ROE under stress.

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86 For insight into multinational ROE, *see* Colonel F.M. Lorenz, *Forging Rules of Engagement: Lessons Learned in Operation United Shield,* MIL. REV., Nov.-Dec. 1995, at 17. The Lorenz article raises an important issue: even with almost identical ROE, units from different countries may lack the common training and will to identically apply the ROE. *See also* Lieutenant Colonel Stephen M. Womack, *Rules of Engagement in Multinational Operations,* MARINE CORPS GAZETTE, Feb. 1996, at 22.

87 See International Law Note, *"Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement,* ARMY LAW., Dec. 1993, at 14.

88 Pocket cards are no panacea. They are predominately training tools for MOOTW. While they tend to make everyone feel better, they are not a necessity for every unit in every operation. Special mission units do not require ROE pocket cards. Combat operations against a declared hostile force only require pocket cards to the extent that they may reflect either the imposition or removal of control measures or constraints.

Doctrine does not define a standard staff approach and procedure for ROE development. The role of judge advocates in the ROE process is mentioned only generally or obliquely in military publication. In some commands, staff primacy in ROE matters resides with the SJA; in others, with the G3 (Operations). Primary staff responsibility for ROE should lie with the G3. The SJA may "draft" the ROE (or ROE supplemental measure, distillation, or extract), but the ROE at the operational and tactical level should remain an operational, not a legal, document.

A recommended approach to the ROE staff process is to form a ROE working group. (The group could be termed an "ROE Board" or exist as part of, or adjunct to, an extant targeting board.) The G3, *G2* (Intelligence), and SJA (or their representatives) constitute the group. The G3 brings knowledge of the mission, operations details, and Commander's Intent; the G2 contributes information concerning the threat (intent, capabilities, and systems); and the SJA adds insight concerning language and meaning, enforceability, and the law of armed conflict. Collectively, the group considers the ROE in the context of the mission statement and the Commander's Intent, both from their own and higher headquarters. The working group is not a committee. Their conclusions and proposals are briefed to, and approved by, the commander (ROE are the commander's rules for the use of force).

If time permits, proposed ROE are distributed for comment to subordinate commanders (brigade and battalion, for example) and senior noncommissioned officers. Recognition of reality is as significant in drafting ROE as situation awareness is in implementing them. A 10th Mountain Division soldier's comment suggests the complex dynamic associated with ROE: "The ROE vignettes are a lot like football plays. We practice the vignettes, but in the real game, they let the fans on the field."[90]

Just as the JCS SROE is guidance from the NCA to the CINCs, ROE in contingency operations are primarily guidance from the CINCs to subordinate commanders. These ROE are typically tailored to the particular mission and scenario and may reflect control measures (for example, no incendiaries, no riot control agents

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[89] "JAGC personnel . . . review ROE" and "provide required training on the law of war and ROEs." FM 27-100, LEGAL OPERATIONS, *supra* note 11, at 17. Judge advocates "[a]ssist in the preparation of and review ROE." *Id.* at 13. "The SJA receives the JTF or Corps ROE from the G3. He recommends changes to the division commander and G3. The SJA works with the division staff and subordinate commanders to ensure that ROE support the operation." FM 71-100, DIVISION OPERATIONS, *supra* note 24, at 8-14.

[90] JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS 76 (28 Feb. 1995). This superb handbook. contained in the JEL Peace Operations CD-ROM, *supra* note 12, should be in every deployment library

(RCA),[91] nor unobserved fires) which result from political or practical considerations. These control measures seldom impact on the firing of small arms by individual soldiers. For most individual soldiers, the term "ROE' is a misnomer. Particularly in MOOTW, and in any scenario without a declared "hostile force,"[92] ROE for the individual soldier might be more appropriately termed "RUF" ("rules for the use of force") or "OFOF" ("orders for opening fire").[93] In such circumstances, the trigger for the use of force is the conduct, not the status, of the threat.

More fundamentally, with the JCS SROE establishing standing policies and rules concerning the right and obligation of unit self-defense, commanders and judge advocates should consider what standing principles they have given their soldiers which enable them to exercise the right and obligation of self-defense. Simple, memorable "default rules" can serve as the basis both for repetitive generalized training and for additional rules in a specific operation.[94] The standing, or "default," principles can be stated as

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[91] Riot control agents (RCAs) are now a matter of particular concern in ROE. Ironically, the United States has recently imposed restrictions on the use of RCA in operations just as it has become involved in operations in which they are useful. In 1993, the United States signed the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter the CWC]. Although the Senate still has not given its advice and consent to the CWC, the President has taken the position that the CWC prohibits the use of RCA as a "method of warfare," and the formerly permissible use of RCA in the rescue of downed aircrews and dispersal of civilians being used as human shields is now prohibited. This position conflicts with Exec. Order No. 11,850 (3 C.F.R. 980 (1971-1975)), *reprinted in* FM 27-10, THE LAW OF LAND WARFARE, *supra* note 78, at 18, C1, 2), which has not been superseded. *(See* CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3110.07, NUCLEAR, BIOLOGICAL, AND CHEMICAL DEFENSE; RIOT CONTROL AGENTS; AND NON-LETHAL WEAPONS (3 July 1995).) Accordingly, judge advocates should anticipate confusion concerning RCA, ensure that any use of RCA is coordinated with the responsible unified command, and plan on the likelihood that NCA approval will be required to employ RCA in virtually any non-law enforcement circumstance.

[92] Distinguish conduct (committing a hostile act or exhibiting hostile intent) from status (membership in a hostile force). In most MOOTW, ROE are based on conduct, not status—typically, there is no declared "hostile force."

[93] For example, the NATO IFOR "ROE Card," dated 10 January 1996, is styled "Commander's Guidance on Use of Force."

[94] The rules are typically a starting, not ending, point. *As* stated in FIELD MANUAL 100-5, OPERATIONS, *supra* note 2, at 2-4, and numerous other references, ROE are tailored, dynamic, and change over time. Nevertheless, most aspects of default rules will not change at the soldiers' level and serve as a valid training base. Further, there are standing unit ROE which, given their proponent, content and audience, are likely consistent with future operational ROE (or extracts thereof) and require no modification for actual combat operations. For an example, *see* "Ranger Regiment Combat ROE" pocket card (Headquarters, 75th Ranger Regiment) *reprinted in* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 8.

acronyms for ease of recollection in training and implementation.95

Standing rules, by whatever name, may be supplemented or modified in—and often during—an actual operation. Soldiers must be alert and responsive to, and trained to anticipate, changes in ROE. Changes in the ***application*** of the ROE may occur because of changes in mission or threat. In Somalia, for example, the overall ROE remained fairly constant throughout the operation. What changed, predominately due to changes in the threat to United States forces, was the way in which the ROE were applied to, for example, Somali Technicals, light trucks carrying crew-served weapons. In the early stages of the operation, Technicals were permissible targets only if they posed a threat to United States forces by demonstrating hostile intent or committing a hostile act. **As** the operation progressed, and Technicals repeatedly fired on United States forces, they were simply deemed a threat to United States forces and could be targeted at any time.[96]

Operations in Macedonia[97] and Haiti illustrate the effect of context, threat, and mission on ROE. These operations also highlight the disciplined flexibility required of United States military personnel who must implement ROE in subtle operations. In Macedonia, United States forces operate under Chapter VI of the UN Charter as part of a UN "peacekeeping force"[98] tasked to observe and report Serbian military movements near the Serbian-Macedonian border. In Haiti, United States forces operated under Chapter VII of the UN Charter as part of a multinational force tasked to restore the Aristide government to power. In Macedonia, the threat to UN forces is low, but fairly certain; in Haiti, the threat was low, but, at least in the early stages of the operation, the threat was uncertain.

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95 *See* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering,* 143 MIL. L. REV. 1 (1994); HAITI LESSONS, *supra* note 21, at 40-42; CENTER FOR *ARMY* LESSONS LEARNED, ROE TRAINIKG: AN ALTERNATIVE APPROACH (May 1996). Like pocket cards, mnemonics are not a panacea; they are training tools that can help soldiers develop judgment, not a substitute for judgment itself. *See* Martins, *supra,* at 86-89, 105.

96 *Compare* pertinent extracts of Unified Task Force (UNITAF) ROE ("You have the right to use force to defend yourself against attack or threat of attack") and the subsequent UN Operation in Somalia (UNOSOM) II ROE ("Crew-served weapons are considered a threat to UNOSOM Forces and the relief effort whether or not the crew demonstrates hostile intent").

97 Macedonia is often termed the "Former Yugoslav Republic of Macedonia" or "FYROM." For purposes of this article, it is referred to as Macedonia.

98 Under the United States doctrinal definition, the force is engaged in a "preventive diplomacy" deployment, not peacekeeping, because it is present to deter violence at a zone of potential conflict where tension exists among several parties. FM 100-23, PEACE OPERATIONS, *supra* note **53,** at **2.**

As of the writing of this article, in Macedonia, Serbian soldiers have pointed small arms at United States patrols and, on at least two occasions, detained United States soldiers for a period of hours.[99] United States soldiers have neither fired at Serb forces nor physically resisted detention. By contrast, in Haiti, a United States Marine platoon preemptively fired on a group of Haitian policemen, killing ten of them, after the Haitian officer in charge of the group raised the muzzle of his submachine gun.[100] The acts of both the soldiers in Macedonia and the Marines in Haiti were appropriate based on their respective missions, threats, and contexts.

Rules of engagement in MOOTW typically stress two concepts: self-defense and restraint, but neither principle is within the exclusive domain of MOOTW. United States forces may use force in self-defense in any context; United States forces frequently practice restraint in war. What makes the principles so significant in MOOTW is the means by which they are regulated. For example, the use of warning shots, a practice conceived with good intentions and fraught with practical difficulties, has crept into ROE as a means of tempering self-defense with restraint. The proper use of warning shots requires rigorous training; in most cases, warning shots may create, not prevent, incidents suggesting lack of discipline.[101]

Conversely, ROE in MOOTW should address the use of force to defend military property, and the circumstances under which force may be used to defend civilians. In addressing these and other appropriate issues, judge advocates and commanders must guard against the temptation to cram ROE with guidance, procedures, or admonitions unrelated to the use of force. Rules of engagement and ROE extracts are diluted when they contain restatements of the law of armed conflict, reporting requirements, or weapons safety instructions.

D. Prisoners and Detainees

Operation Desert Storm presented a relatively uncomplicated context within which to address prisoner of war issues.[102] The war was unquestionably an international armed conflict, and southern

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99 Interview with Task Force Legal Advisors, Garmisch, Germany (December 1994). See also Captain David G. Bolgiano, *Firearms Training System: A Proposal for Future Rules of Engagement Training*, ARMY LAW., Dec. 1995, at 79.

100 *See* Tom Rhodes & Ian Brodie, *Americans Admit They Fired First*, THE TIMES, Sept. **26,** 1994, at 1.

101 *See, e.g.,* the discussion and analysis of *United States v. Mowris,* a case arising from the use of warning shots in Somalia, in MARTINS, *supra* note 95, at **3,** 17.

102 *See, e.g.,* Captain Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures,* ARMY LAW., Aug. 1994, at 16.

Iraq was a territory under partial occupation, within the meaning of Article 2 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949[103] (GPW). Persons who met the criteria of Article 4 of the GPW (members of the Iraqi Army, for example) were accordingly "the right kind of people in the right kind of place" and entitled to the status of prisoners of war as a matter of law.

Military operations other than war frequently present scenarios in which United States forces encounter persons who do not qualify for legal status as prisoners of war. In Panama, Somalia, and Haiti, for example, persons captured after having committed hostile acts against United States forces were not entitled to legal status as prisoners of war. None of the persons were in an international armed conflict or in occupied territory.[104] In Somalia, for example, United States forces were confronted by armed civilians who fought with impunity as unlawful combatants. The challenge in such operations is to ensure that soldiers act with discipline and humanity and that they act in accordance with the rules on which they have been trained.

In this regard, the humanitarian provisions of the GPW are of particular value in nuanced operations. They establish a baseline or foundation of understood rules of humanity. They provide a common point of reference and minimum standards of humanitarian treatment from which particular problems may be resolved either by application or analogy.

In Panama, Somalia, and Haiti, captured persons — termed "detainees' — were treated as prisoners of war during their capture and initial period of detention.[105] Although not qualifying for prisoner of war status, detainees were treated with dignity and humanity. Detainees in Panama, most of whom met the criteria for members of the regular armed force under Article 4 of the GPW, were treated as prisoners of war throughout their brief period of captivi-

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103 Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW].

104 Some scholars would disagree and assert that Operation Just Cause was an international armed conflict thus triggering prisoner of war status for the Panamanian Defense Forces. *See, e.g.,* Major John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause,* 133 MIL. L. REV. 31 (1991).

105 This broad practical application of the humanitarian provisions of the GPW was used by the United States with regard to the Viet Cong (PRUGH, LAW AT WAR, *supra* note 13, at 61-78) and makes good sense today. United States forces train on how to handle prisoners of war, and field soldiers should not be burdened with legalistic distinctions between "prisoner of war" and "detainee." Judge advocates and senior commanders, however, should know that the difference between the two terms is not merely semantic; similarly, the distinction between "treatment" and "status" as a prisoner of war can be legally, practically, and politically profound.

ty.[106] In Somalia and Haiti, detainees were treated in accordance with the humanitarian, but not administrative or technical, standards of the GPW.

In both Somalia and Haiti, United States forces detained persons who fell within two deliberately narrow categories: those who posed a threat to the force and those who had committed a serious criminal act. Judge advocates prepared the list of humanitarian standards for detainees by using the humanitarian provisions of the GPW, among other authorities,[107] as a general foundation. They then tailored additional standards to the nuances of each operation.

In Somalia, for example, detainees were originally held in anticipation of release to the custody of an emerging Somali government. As the political situation in Somalia failed to improve, detainees were held not only for a longer time than anticipated, but toward an uncertain disposition. The United States refrained from trying any of the detainees (many of whom were unlawful combatants or common criminals) by military commission or general court-martial as it could have under Articles 18 and 21 of the UCMJ and under the law of armed conflict.[108] Some of the detainees, held for less serious infractions, were simply released over time. More serious offenders were transferred to the custody of the UN.[109]

Although human rights groups generally found the conditions of detention to be acceptable, the uncertain circumstances and duration of the detention provoked some criticism. Some detainees objected to being held without arraignment or trial. Some claimed that they did not know why they were being held or that they were mistreated in the course of interrogation. Several detainees expressed concern that they were afforded no forum in which to communicate with military authorities and "tell their side of the story" concerning the incident occasioning their detention.[110]

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106 Panamanian soldiers were not prisoners of war as a matter of law because the intervention was not an international armed conflict. United States forces were present at the invitation of the lawfully elected government of President Endara. *Cf.* United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) (the court, finding the GPW to be self-executing, held that Manuel Noriega was a "prisoner of war"). The ruling was irrelevant to the defense, however, since Noriega was charged with pre-capture criminal offenses unrelated to any claim of privileged warlike act.

107 Preeminent among the other authorities was the Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, U.N. Doc. A/810 (1948).

108 *See generally* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

109 This transfer would have been prohibited by law had the detainees been prisoners of law. The UN is neither a signatory nor a party to the GPW.

110 *See, e.g.*, JOINT COMMITTEE PRINT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 258-60 (Feb. 1994).

In Haiti, judge advocates helped develop an innovative approach to address the criticisms and concerns which had arisen in Somalia.[111] A judge advocate was assigned to the Joint Interrogation Center and to the Joint Detention Center. Military Intelligence interrogators questioning the detainees were instructed to use the same rules, and restrict themselves to the same interrogation techniques, as would apply to prisoners of war. Detainees were allowed visitation hours four days per week. Visitors could include family members, physicians, or attorneys. The Detention Center Commander provided a daily list of detainees to the ICRC.[112]

Each detainee was visited by a "detainee judge advocate" within seventy-two hours of his detention.[113] Through an interpreter, the detainee judge advocate explained to the detainee the basis for his detention and afforded the detainee the opportunity to communicate, through the detainee judge advocate, to the general officer commanding the multinational force. The communication of the detainee, which generally requested immediate release, was reduced to writing, then forwarded through the SJA to the commanding general. The SJA, and the force's J-2 (intelligence section) and provost marshal, would collectively review detainees' requests for release.

Almost all of the detainees in Haiti requested release through this procedure; about one-fourth of them were released by order of the commanding general. Most were released within two weeks of their detention after investigation established that they were not a threat to the multinational force. The remaining detainees, most of whom had been detained for commission of serious criminal acts, were transferred to the custody of the Haitian government.[114]

The utility of the GPW in establishing minimum treatment standards for detainees is exemplified by the provisions of the Convention on the Safety of United Nations and Associated Personnel.[115] Applying by its terms only in those operations which

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111 The approach developed by judge advocates in Haiti made good political, practical, and legal sense in that particular operation. The approach incorporated aspects of the Haitian Constitution and international law, but was *not* ***required*** by either law. Although praised by humanitarian organizations and commentators, the approach does not establish a new standard or requirement of detainee law or policy.

112 The SJA served as the command's liaison to the ICRC, a role of the judge advocate in all United States combat operations since at least the Vietnam War. The judge advocate's ICRC liaison role is doctrinal *(see* FM 71-100-2, **INFANTRY** DIVISION **TTP**, *supra* note 24, at 6-28).

113 The "detainee judge advocate" did not establish an attorney-client relationship with the detainee. Another judge advocate reviewed the written basis of the detention within **72** hours of the detention.

114 The number of detainees reached a high of about 200 during the first month of the intervention, but was down to 24 by January 1995. HAITI LESSONS, ***supra*** note 21, at 60.

115 G.A. Res. 49/59, Feb. 17, 1995, U.N. **Doc.** A/Res./49/59 (1995), 34 I.L.M. 482 (1995).

the GPW does not apply as a matter of law, the Convention requires that captors treat captured or detained UN and associated personnel in accordance with "the principles and spirit of the Geneva Conventions of 1949." This approach — demanding treatment, but not status, in accordance with the GPW — was used by the United States in its communications with Mohammed Aideed concerning Chief Warrant Officer Two Michael Durant, the Army helicopter pilot detained in Somalia in October 1993.116

E. Indigenous Civilians

Humanitarian protections afforded to civilians cannot only affect, but define, the conduct of military operations. In both Grenada and Panama, the safety of United States civilians present in those nations was an articulated basis for United States intervention under Article 51 of the UN Charter. The suffering of indigenous civilians was at the very heart of military operations in Somalia and Rwanda. In Haiti, the poor human rights record of the de facto government of General Cedras was cited as moral, if not legal, persuasion for United States intervention.

The problem for commanders and judge advocates in such operations is how to translate lofty humanitarian goals into practical action. When given mission statements which include such general directives as "restore order" or "create a stable environment," how should judge advocates assist commanders discharge their humanitarian obligations toward civilians? What minimum humanitarian rules apply to civilians?[117]

In occupied territory, the entire range of protections, responsibilities, and rights enumerated in the Geneva Convention for the Protection of Civilians in Time of War[118] (GC) apply to civilians who are "protected persons" within the scope of the Convention. "Occupation," a term of legal precision and significance, is a question of fact.[119] Occupation may be partial or total and follows hostile

116 In contrast, Chief Warrant Officer Two (CW2) Bobby Hall, captured in December 1994 when his helicopter crashed in North Korea, was a prisoner of war. The Korean War was not terminated by peace treaty; military operations have merely been suspended by armistice. Accordingly, CW2 Hall was "captured" in an international armed conflict, but released under GPW Article 118.

117 In an effort to answer this question in today's complex political-military environment, the International and Operational Law Department of The Army Judge Advocate General's School, United States Army, developed a new category of law: "Civilian Protection Law" (CPL). Civilian Protection Law is a logical and dynamic extension of the law of occupation. An entire chapter is devoted to CPL in the **OPERATIONAL** LAW HANDBOOK, *supra* note 12.

118 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, **6** U.S.T. 3516, 75 U.N.T.S. **287** (entered into force Oct. 21, 1950).

119 FM 27-10, THE LAW OF LAND WARFARE, *supra* note 78, at 139.

invasion, whether resisted or unresisted. An example of partial occupation was the United States occupation of southern Iraq after the Gulf War; an example of total occupation was Iraq's occupation of Kuwait after the 1990 invasion.

Most recent military operations were not conducted in occupied territory. The United States was not an occupier in Grenada, Panama, or Rwanda because it was present at the invitation or acquiescence of the governments of those countries. The United States was not an occupier in Somalia because there was no hostile invasion nor was there a supplantation of governmental authority within former *enemy* territory. Similarly, in Haiti, the United States was not an occupier because there was no hostile invasion; however, this point is much less clear in Haiti than in Somalia. United States forces were present in Haiti at the invitation of the de jure Aristide government, at the acquiescence of the de facto Cedras government, and at the behest of the UN (through Security Council Resolution 940).

Nevertheless, the duress attendant to the acquiescence of the Cedras government—and the substitution of United States military authority for the authority of the Cedras government—allow a reasoned argument that United States forces occupied Haiti subsequent to an unresisted invasion. Much like the initial debate over whether the United States was an occupier in southern Iraq, the debate over the legal context of United States forces' presence in Haiti is practically superfluous. The United States routinely assumes the minimum humanitarian responsibilities of an occupier as a matter of policy in the areas under the control of United States Armed Forces. Since World War II, however, the United States has not issued an occupation proclamation or otherwise exercised the rights of an occupier.

In territory which is not occupied, but in which United States forces are present as participants in an international armed conflict, the general human rights protections of the GC apply to civilians. In combat, the goal of United States forces is to minimize civilian casualties and minimize civilian interference with military operations. Insofar as practicable, United States forces should observe the humanitarian principles of the law of occupation on the battlefield and in the areas transited by United States troops.

In unoccupied territory where United States forces are not present as participants in an international armed conflict, the GC applies only as a matter of policy. It serves mainly as a point of reference and a basis for analogy. For example, in Somalia, United States forces protected civilians from serious criminal acts of other civilians only to the extent that they were in areas under United

States forces' control. A similar approach was utilized in Haiti with the ROE allowing United States forces to detain and using deadly force, if necessary, "persons observed committing serious criminal acts."[120]

The locational limitations present in both Somalia (areas under United States control) and Haiti (criminal acts under observation) were deliberate and designed to restrict the law enforcement activities of United States forces to those mandated by the limited mission statement in each operation. On at least one occasion in Somalia, United States forces properly refused to send soldiers to detain a Somali civilian alleged to have murdered a relief worker. The murder occurred, and the accused Somali civilian resided, outside the area of United States forces' control.[121] The United States military was not the national police force for Somalia.

In Haiti, in a heavily publicized incident occurring two days into the operation, the United States military was criticized for not intervening to prevent the beating death of a civilian coconut vendor. The civilian was beaten with clubs wielded by Haitian police in view of United States soldiers.[122] Despite initial press reports to the contrary, the extant ROE would have allowed the soldiers to stop the beating and detain the attackers.[123] However, United States forces were not legally obligated to act. At the time of the incident, United States forces were consolidating their positions and testing the terms of the Carter-Cedras "power sharing" agreement. They were rightfully concerned about their primary mission at the time: protecting the force. The United States military was not a guarantor for the safety of all civilians in Haiti.

F. Discipline

Discipline is a fundamental aspect of Army operations.[124] In contemporary military operations, where restraint and legitimacy are often important to mission success, and where misconduct can have immediate world-wide impact, disciplined conduct is essential. Discipline is a central component of military effectiveness:

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120 Headquarters, CJTF 180 PROE, "Civil-Military Operations in Haiti," para. 7 (23 Sept. 1994).

121 ***See Law and Anarchy, supra*** note 44, at 27, 35.

122 ***See*** Kenneth Freed, ***Haitian Police Attack Crowds as American*** *Troops* ***Look On,*** L.A. TIMES, Sept. 21, 1994, at A1.

123 In response to concerns raised by judge advocates, the ROE already had been changed to expressly allow action by United States forces in cases of Haitian civilian violence, but new ROE cards reflecting the change had not been issued to soldiers. Soldiers were still operating under a generic permissive-entry ROE card dated 6 September 1994. ***See*** HAITI LESSONS, ***supra*** note 21, at 32-34.

124 FM 100-5, OPERATIONS, supra note 2, at 2-3.

'Untrained and undisciplined troops take heavy casualties; trained and disciplined ones inflict them."[125]

Disciplined operations are not premised on fear of prosecution under the UCMJ. Adherence to the rule of law is instilled by training and based on our national and military values:

> A nation state that disregards the human rights of individuals makes warfare unnecessarily harsh, increases the resolve of its enemy, and changes the nature of the conflict. How the Army fights is a mark of what it is and what it stands for. Laws of war are only effective in reducing casualties and enhancing fair treatment of combatants and noncombatants alike so long as trained leaders ensure that those laws are obeyed. The commander ensures the proper treatment of prisoners, noncombatants, and civilians by building good training programs that reinforce the practice of respecting those laws.[126]

Former Chief of Staff of the Army, General Gordon Sullivan, once told the following story: On the first day of the Haiti operation, a young soldier from the Army's 10th Mountain Division disembarked from a Blackhawk helicopter and took up a prone firing position—right in front of a network camera crew. A reporter walked over to the soldier, and asked him why he had taken up a defensive firing position when the only apparent threat was from the horde of overzealous reporters. The young soldier responded quickly and surely, "Because that is what I was trained to do."[127]

Judge advocates can assist in the development of good training programs.[128] They can help make units more capable and versatile. Wherever possible, trainers should combine tactical, law of armed conflict, and ROE training. Training should be realistic, evaluated, and tied to the unit's mission-essential task list.[129] Law of armed conflict training at the soldier-level should center on performance-oriented training on the "Soldier's Rules," nine minimum principles

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125 Brigadier General Jack Rogers, *quoted in* DEP'T OF DEFENSE, UNITED STATES SPECIAL OPERATIONS COMMAND PUBLICATION 1, SPECIAL OPERATIONS IN PEACE AND WAR C-1 (25 Jan. 1996).

126 FM 100-5, OPERATIONS, *supra* note 2, at 2-3, 2-4.

127 General Gordon R. Sullivan, speech at the Army Judge Advocate General's Corps Worldwide Continuing Legal Education Conference. The Judge Advocate General's School, Charlottesville, Virginia (Oct. 1994).

128 *See, e.g.*, William H. Parks, *Teaching the Law of War*, ARMY LAW., June 1987, at 3; H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, *ARMY* LAW., July 1983, at 1.

129 Judge advocates should have some familiarity with the Army's training doctrine—it works. *See* DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE (15 Nov. 1988); DEP'T OF ARMY. FIELD MANUAL 25-101, BATTLE FOCUSED TRAINING (30 Sept. 1990).

which every soldier must know and obey.[130] Leader-level training may be more advanced, involving discussions and problem-solving exercises. Particularly when preparing for actual operational application, classes on ROE and on the law of armed conflict should be standardized throughout the unit.[131]

When breaches of discipline occur, commanders and judge advocates must process military justice actions fairly and efficiently in accordance with law and regulation. Military justice is the codal mission of the JAGC[132] and it must be accomplished flawlessly. In operations, this includes making arrangements for defense counsel and military judge support and correctly establishing courts-martial convening authorities in the field and at the home station. The Army must retain its capability to enforce discipline in the field, whether in a combat or noncombat environment. The enforcement of discipline includes trying courts-martial in combat zones.[133] All judge advocates must know how to try courts-martial; as the number of cases diminishes, the importance of correctly handling cases, both from the prosecutorial and defense perspective, increases.

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130 The nine rules, listed in DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, ch. 14 (19 Mar. 1993), are as follows:

(1) Soldiers fight only enemy combatants.

(2) Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superiors.

(3) Soldiers do not kill or torture enemy prisoners of war.

(4) Soldiers collect and care for the wounded, whether friend or foe.

(5) Soldiers do not attack medical personnel, facilities, or equipment.

(6) Soldiers destroy no more than the mission requires.

(7) Soldiers treat all civilians humanely.

(8) Soldiers do not steal. Soldiers respect private property and possessions.

(9) Soldiers should do their best to prevent violations of the law of war. Soldiers report all violations of the law of war to their superiors.

131 A superb example of standardized training is the package developed by the SJA section, 1st Armored Division/Task Force Eagle in preparation for the NATO IFOR mission. The package, styled "Pre-Deployment Legal Briefing," covers ROE, law of armed conflict, Code of Conduct, and Treaty issues. MATERIALS ON OPERATIONAL LAW, *supra* note 14, at 50, contains the briefing slides.

132 10 U.S.C. § 801 (1988 & Supp.) (UCMJ art. 1); 10 U.S.C. § 806 (1988) (UCMJ art. 6); 10 U.S.C. § 3064 (1988 & Supp.); 10 U.S.C. § 3072 (1988) (creating the Corps and authorizing The Judge Advocate General).

133 Matters likely considered for resolution by courts-martial in a combat zone include "wartime offenses," offenses inimical to the maintenance of good order and discipline in the field, and offenses violating the law of armed conflict (although not charged as such as a matter of policy). For a discussion of "wartime" and "combat offenses," see OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 17. Whether to try cases in a combat zone also depends on a number of factors other than the offense, including the intensity and duration of the conflict and the availability of panel members and witnesses. The decision should never hinge on the availability of counsel, military judges, or court reporters.

Judge advocates must have a clear understanding of how to create provisional units and transfer jurisdiction; how to establish courts-martial convening authorities;[134] and how to administer "joint justice" in a Joint Task Force (JTF).[135] Although the legal authority already exists,[136] and joint doctrine and implementing regulations are maturing,[137] practical experience in "joint justice" is limited. The growing role of the joint force commander[138] will reduce the role of the component commander. As a result, the impact of component regulations and policies will diminish, and divergence among the regulations and policies will become increasingly vestigial. Absent compelling reason to the contrary, joint force commanders should have clear disciplinary authority over their subordinates. Their judge advocates must push to make it happen.

As the military draws down and increasingly relies on civilian employees and contractors to perform operational and tactical logistical functions, judge advocates will face questions concerning discipline of, and jurisdiction over, civilians accompanying the force in the field.[139] While sporadic effort has been made to expand courts-martial jurisdiction to include civilians accompanying the force in

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134 Notwithstanding the statement of command relationships found in plans and orders, judge advocates must look to law and regulation to determine whether commanders are in fact courts-martial convening authorities. Judge advocates should read UCMJ Articles 22 through 24, and study MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), R.C.M. 201(e), "Reciprocal Jurisdiction," and the analysis thereto [hereinafter MCM]. While it is widely known that the commander of a "unified and specified combatant command" may convene courts-martial (*id.* R.C.M. 201(e)(2)(A)), it is less known that the Secretary of Defense may empower "any commanding officer of a joint command or joint task force [to] convene general courts-martial for the trial of members of any of the armed forces" *iid.* R.C.M. (e)(2)(B)).

135 DEP'T OF DEFENSE, JOINT PUBLICATION 0-2, UNIFIED ACTION ARMED FORCES ch. IV (10 Jan. 1995) [hereinafter UNIFIED ACTION] discusses the exercise of disciplinary authority in unified command, subordinate unified command, and JTF organizations. The publication, either in hard copy or on the JEL CD-ROM, *supra* note 18, is a must for a deployment library in that it addresses the law, policy, and practice of jurisdiction, nonjudicial punishment, courts-martial trial and punishment, and rules and regulations in a joint environment.

136 *See* UCMJ art. 22 and MCM, *supra* note 134, R.C.M. 201(e); R.C.M. 503 (authorizing the detailing of military judges and counsel from one armed force to serve in courts-martial in a different armed force).

137 *See, e.g.,* DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 8-6e (8 Aug. 1994)(C1, 16 Dec. 1994), which addresses judicial cross-servicing, and, in change 1, addresses imposition of, and procedures concerning, nonjudicial punishment by multiservice commanders and officers in charge. *See also* DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-12b (24 Apr. 1988).

138 The joint force commander can be a geographic commander in chief (CINC) or a JTF commander.

139 *See, e.g.,* Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem,* 148 MIL. L. REV. 114 (1995); Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Gouernment Contracts?,* 147 MIL. L. REV. 1 (1995).

circumstances short of war,[140] no civilian is subject to the UCMJ unless either serving with or accompanying the force in a declared war or accused of a war crime.[141]

Nevertheless, current United States policy allows the arming of civilians for personal defense; authorizes the training of civilians in the law of armed conflict, UCMJ, and use of weapons and equipment; permits the provision of weapons, protective equipment, and uniforms; and requires the issuance of Geneva Convention identification cards.[142] If captured by the enemy in a conflict to which the GPW applies, civilians accompanying the force in the field shall be accorded status as prisoners of war.[143] Arming civilians raises three of the many potential questions associated with the current law and policy pertaining to civilians accompanying the force. One is whether civilian employees and contractors are sufficiently trained to safely and effectively handle weapons. The second is whether persons over whom there is no real disciplinary authority should be armed. Finally, while there is little doubt that civilians accompanying the force are lawful targets for the enemy,[144] what precisely are the limitations on their use of force and how does this affect their status under the law of armed conflict?[145]

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140 A proposed amendment to the UCMJ, now under study, would give courts-martial jurisdiction over civilians accompanying the force in "time of armed conflict," a broader period than "time of war," but still limited in that many contemporary operations are conducted in neither war nor armed conflict. The amendment was introduced in the House as H.R. 1530, 104th Cong., 1st Sess. (1995) and in the Senate as S. 1026, 104th Cong., 1st Sess. (1995).

141 In ***United States v. Auerette,*** 41 C.M.R. 363 (C.M.A. 1970), the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) held that UCMJ Article 2(a)(10) jurisdiction over civilians serving with or accompanying an armed force in the field "in time of war" applied only in a declared war. Notwithstanding the holding in Averette, UCMJ Article 18 grants to general courts-martial the jurisdiction to try ***"any*** person who by the law of war is subject to trial by a military tribunal" (emphasis added).

142 ***See*** DEP'T OF DEFENSE, DIRECTIVE 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD US CITIZEN CIVILIAN EMPLOYEES (10 Apr. 1992); UNITED STATES ARMY MATERIEL COMMAND, AMC CIVILIAN DEPLOYMENT GUIDE (Mar. 1994).

143 GPW, ***supra*** note 103, art. 4(A)(4).

144 ***See, e.g.,*** THE DESERT STORM ASSESSMENT TEAM, REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, III.F., Labor and Employment Law (22 Apr. 1992). "Civilian employee[s] accompanying the force are, of course, legitimate targets of enemy attack." ***Id. See also*** William H. Parks, ***Air War and the Law of War,*** 32 **A.F.** L. REV. 1, 131 (1990).

145 While the thrust of developing international law suggests that civilians accompanying the force in the field are combatants ***(see*** INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 515 (Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY]), United States policy reflects the position that at least contractors are noncombatants. ***See*** DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM, para. **3-2d** (16 Dec. 1985) ("[Contractors] may not be used in any role that would jeopardize their role as noncombatants."). Although the distinction between combatant and noncombatant ***within the armed forces*** may no longer be

Since Operation Desert Storm, a punitive order regulating conduct, often referred to as "General Order Number 1," has become common in operations.[146] Very much like ROE, a General Order Number 1 addresses the commander's concerns and lays out the commander's rules. Like ROE, the order should be tailored to each operation. Absolute prohibitions on war trophies[147] and alcohol, while appropriate in most operations, may be unduly restrictive in other scenarios.[148] As always, the commander must strike the balance among morale and discipline and reality and risk.[149]

In combat, a similar balance must be struck between control and latitude, and safety and audacity. Accidents, including fratricide, within the force are unfortunate consequences of operations. While they are not individually inevitable, they are collectively

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critical under international law (PROTOCOL COMMENTARY, *supra*, at 506), it is significant in determining numerous disciplinary, employment, and veterans' status issues under United States domestic law. A cogent examination of these issues is found in Brady, *supra* note 139.

[146] Sample General Orders, including the JTF 190 Order used in Haiti, are in the OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 17.

[147] Regarding war trophies, ***see*** 10 U.S.C. § 2579 (1996), a product of the 1994 National Defense Authorization Act. The legislation mandates standards not yet published in implementing directives and regulations. The Department of Defense should publish a governing directive; the Army regulation on war trophies is decades old. ***See*** DEP'T OF ARMY, REG. 608-4, CONTROL AND REQUISITION OF WAR TROPHIES AND WAR TROPHY FIREARMS (28 Aug. 1969) (C1, 27 Aug. 1975). One of the purposes of a war trophy or minimum vehicle number convoy policy is to reduce needless risk to soldiers. In Panama, the Gulf, and Bosnia, soldiers were killed or maimed by exploding ordnance or mines when they acted in contravention of orders and policy. Consider prohibitions on unauthorized bunkering, souvenir hunting, and "climbing on or in enemy vehicles and equipment." (A good maxim in areas where unexploded ordnance and booby traps are a problem: "If you didn't drop it, don't pick it up.")

[148] In a multinational operation, for example, commanders contemplating a complete ban on alcohol should consider that other national contingents may have liberal alcohol policies. While considering the adverse impact that this may have on morale, commanders also should consider the undeniable positive impact of an alcohol ban on discipline and efficiency in the field.

[149] When drafting the order, consider the "6 C Principle:"

1. COMMON SENSE: Does the order make sense?
2. CLARITY: Is the order understandable at the lowest level?
3. COMMAND INFORMATION (CI): Is the order publicized through all CI means available?
4. CONSISTENCY Is the order applicable, enforceable, and enforced throughout all levels and layers of command? (An order promulgated for an entire corps is better than diverse orders within its subordinate divisions; a policy promulgated by a unified command and applicable to all of its component commands is better still.)
5. CUSTOMS: Are amnesty and leaders' inspection procedures in place prior to redeployment customs inspections?
6. CAUTION: Does the order reflect the commander's risk assessment?

foreseeable.[150] Mishaps will occur. While accidents should not compromise a mission or halt an operation, they require investigation for myriad reasons, the most important is to ascertain facts to prevent their recurrence.[151] Judge advocates must stand ready to participate in administrative investigations, commander's inquiries, and related activities, including summary courts, line of duty investigations, and casualty notification and survivor assistance duty. Judge advocates must anticipate untoward events and subsequent scrutiny, In more serious cases, or to ease the burden on other officers, judge advocates will serve as investigating officers. In most cases, judge advocates will advise investigating officers and the command. In either event, the command legal section, including its legal noncommissioned officers, has a vital role in completing an accurate, thorough, and legally sufficient report of investigation.

VI. The Future

The challenges of the future are many—the world is becoming a more dangerous place.[152] Despite good intentions,[153] war will not disappear; it will just become more confusing. The nature of future conflicts will involve competitions of diverse technologies as well as clashes of diverse interests: unregulated weapons of mass destruction versus strictly controlled precision munitions, sticks and clubs versus directed energy weapons, and blunt force versus information warfare.

Not all challenges are external. Changes in force size, structure, and systems afford both opportunity and risk.[154] Nevertheless, change, like the Army's journey into the Twenty-First Century, is inevitable.155

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150 *See generally* Lieutenant Colonel Charles R. Shrader, *Friendly Fire: The Inevitable Price,* PARAMETERS, Autumn 1992, at 29.

151 *See, e.g.,* DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-5 (11 May 1988) ("The primary function of any investigation . . . is to gather facts and report them to the appointing authority.").

152 *See, e.g.,* Major Ralph Peters, *After the Revolution,* PARAMETERS, Summer 1995, at 7; Robert D. Kaplan, *The Coming Anarchy,* ATLANTIC MONTHLY, Feb. 1994, at 44; ALVIN & HEIDI TOFFLER, WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY (1993); Samuel P. Huntington, *The Clash of Civilizations?,* FOREIGN AFF., Summer 1993, at 22.

153 *See* MICHAEL HOWARD, WAR AND THE LIBERAL CONSCIENCE (1978).

154 *See, e.g.,* Steven Metz & Lieutenant Colonel James Kievit, *The Siren Song of Technology and Conflict Short of War,* SPECIAL WARFARE, Jan. 1996, at 2.

155 All who will lead the Army into the next century should consider Brigadier R. G. S. Bidwell's "five fallacies: "the fallacy of miniaturism (a small good army cannot defeat a big good army); the fallacy of the magic weapon (there is no such thing); the fallacy of war as chess (wars are not won by maneuver alone); the fallacy of the bloodless operation (such is self-deception); and the fallacy of the passive enemy (possible, but neither likely nor completely predictable). Brigadier R. G. S. Bidwell, *The Five Fallacies: Some Thoughts on British Military Thinking,* THE ROYAL UNITED SERVICE INSTITUTION JOURNAL, Feb. 1967, at 53.

As the Army marches toward Force XXI, the operational law role of the judge advocate becomes even more critical. Smaller, more lethal forces require capable staff officers who are able to process and exploit information.[156] Judge advocates can serve as multifunctional staff officers. They possess the education and experience, judgment and maturity, and mental acuity and flexibility to cope with the complexities and pace of tomorrow's operations. Their greatest asset is the mind,[157] and they require extraordinarily little equipment or support to be fully operational.[158] Judge advocates are force multipliers, particularly within smaller deployed headquarters elements.

The Judge Advocate General's Corps of the future will be:

- joint and interagency compatible;
- multifunctional;
- integrated in doctrine;
- a success multiplier; and
- a nonlethal element of military power.

The Corps will be joint and interagency compatible, with judge advocates and legal noncommissioned officers trained and ready to deploy in any command or operational environment. Deployed legal elements will likely be joint, built on or with existing headquarters,

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156 A Force XXI objective is to "win the information war." *See, e.g.*, DEP'T OF ARMY, OFFICE OF THE CHIEF OF STAFF, FORCE XXI AMERICA'S ARMY OF THE 21ST CENTURY, 15 Jan. 1995, at 22.

157 "The military staff must be adequately composed: it must contain the best brains in the fields of land, air, and sea warfare, propaganda war, technology. economics, politics, and also those who know the peoples' life." GENERAL ERICH VON LUDENDORFF, TOTAL WAR (1935), *quoted in* UNIFIED ACTION, *supra* note 135, at IV-11.

158 Many judge advocates have remarked that they are ready to practice with "a pen, a green memo pad, the *Operational Law Handbook*, and the MCM." CD-ROM technology, a 486 or Pentium computer with preloaded form sets, software compatible with the deployed headquarters, the LAAWS program, and a communications link greatly enhance the capability of the deployed judge advocate (deploying judge advocates should have not only the JEL CD-ROMs, *supra* notes 12 and 18, but other available CD-ROMs such as the ICRC's CD-ROM on "International Humanitarian Law"). United States Army Special Forces command judge advocates have fielded the "Deployable Law Office," which includes, within a briefcase, a notebook computer with CD-ROM, printer, telephone, optical scanner, and camera; the system is powered by batteries and a solar panel. More recently, the Developments, Doctrine, and Literature Department at The Judge Advocate General's School and the Office of the Staff Judge Advocate, United States Army Forces Command, have developed a "Rucksack Deployable Law Office and Library (RDL)," a set of similar capabilities that can serve as the basis for training, equipping, and task organizing legal support elements. The latter organization has purchased more than 80 RDLs for Division and Corps staff judge advocate sections, and the RDL has become for judge advocates the TRADOC-approved "workaround" to the Army Battle Command System (ABCS). *See generally* DEP'T OF ARMY, FIELD MANUAL 24-7, ARMY BATTLE COMMAND SYSTEM (ABCS): SYSTEMS MANAGEMENT TECHNIQUES (1996). Legal support tactics, techniques, and procedures are fast incorporating these promising new information and digital technologies.

and staffed with modules of judge advocates and legal noncommissioned officers.[159] Joint commands in general, and the unified commands in particular, will continue to gain in importance—and so will their legal advisors.[160] The Corps must develop judge advocates for increasingly key joint assignments.[161] Reserve Component judge advocates and the Corps' civilian attorneys, with their critical legal skills and interagency experience, are an integral part of the Corps of the future.

Judge advocates will increasingly serve as multifunctional staff officers, particularly in civil-military and postconflict operations. Judge advocates have a traditional role in civil affairs.[162] Tomorrow's Army should strongly consider giving the Judge Advocate General's Corps staff responsibility for the civil affairs/civil-military operations mission.[163]

The role of the judge advocate will be increasingly integrated into Army and joint doctrine. The revitalization of the Center for

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159 The concept of "modularity," much discussed in the context of division redesign, is nothing new for the Corps. With the exception of some divisions in Operations Desert Shield and Storm, units or unit composites typically choose to deploy tailored legal cells or elements, not the entire SJA section. Requirements for legal support and services continue at home station. Furthermore, United States Army Reserve judge advocate offices already are modular.

160 "Jointness" is a profound phenomenon which has only marginally impacted the military legal community. The day likely will come when unified command legal offices are large organizations and the CINCs' legal advisors are brigadier generals. The relative rank and significance of the services' Judge Advocates General and the Chairman's legal advisor will, along with pressure for civilianization and service consolidation, be a major organizational issue facing the Corps of the early Twenty-First Century.

161 Aside from joint duty assignments, a means for judge advocates to become more proficient is to allow them to complete Phase II of their Professional Joint Education (PJE) at the Armed Forces Staff College. Graduation from the Command and General Staff Officer Course constitutes completion of Phase I of the PJE. Whether judge advocates should become joint specialty officers (JSOs) is a question worthy of careful study. On the developing process of joint education, ***see*** JOINT CHIEFS OF STAFF PUBLICATION, A STRATEGIC VISION FOR THE PROFESSIONAL MILITARY EDUCATION OF OFFICERS IN THE TWENTY-FIRST CENTURY (1995).

162 Judge advocates were involved in the emerging stages of Army civil affairs. In 1941, The Judge Advocate General (and later Provost Marshall General), Major General Allen W. Gullion, suggested the need for advanced military government training. General Gullion supervised the production of ***Field Manual 27-5, Military Government.*** The Corps was offered the military government mission but demurred. HARRY L. COLES & ALBERT K. WEINBERG, US *ARMY* IN WORLD WAR II SPECIAL STUDIES, CIVIL AFFAIRS: SOLDIERS BECOME GOVERNORS 8-29 (1964). Ironically, the Army's School of Military Government opened at the University of Virginia, later "the home of the Army lawyer," while The Judge Advocate General's School held classes at the University of Michigan.

163 In Exercise Prairie Warrior 1996, the capstone exercise for the Army Command and General Staff College and part of the Army Advanced Warfighting Experiment, judge advocates served as the G5 of the Corps and as the G5 of one of two divisions participating in the exercise.

Law and Military Operations,[164] which has involved judge advocates more fully in the Army's Combat Training Centers,[165] is a major investment by the Corps in the Army of the future. Not only must the Corps continue to refine its doctrine, it must ensure that developing Army and joint doctrine reflects the role of the judge advocate.[166] Judge advocates are key players in operations; their continued presence in deployed units must be enshrined in doctrine, not dependent on the force of personality.

Judge advocates will continue to act as success multipliers. Proactive operational law advice and legal support and services in the field will facilitate mission accomplishment by unburdening commanders, reducing distractions, enforcing discipline, and promoting effectiveness. Prompt and astute advice, and effective training contributions, can set the conditions for future success. Planning and executing the conflict termination[167] and postconflict phases of future operations will increasingly involve judge advocates; they will become key advisors in mission analyses, particularly in helping define success criteria and end states. Judge advocates will assist commanders in executing disciplined operations in compliance with an evolving law of armed conflict, and provide more sophisticated advice in the areas of intelligence law, special operations, and information warfare. They will continue to assist all soldiers and families through legal assistance and family support activities.

The Corps of the future, even more than today, will be a nonlethal element of military power. Its judge advocates are instruments of both engagement and disengagement168 and merit an expanding

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164 *See* Major Mark S. Martins, *Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff,* ARMY LAW., Aug. 1995, at 3.

165 A judge advocate has served as an observer-controller (OC) at the Combat Maneuver Training Center (CMTC), Hohenfels, Germany since 1993. A judge advocate OC was assigned to the Joint Readiness Training Center (JRTC), Fort Polk, Louisiana, in 1995, *see id.*, and two more judge advocates and a legal NCO will be assigned to the JRTC in 1996. A judge advocate was assigned to the Battle Command Training Program (BCTP), Fort Leavenworth, Kansas, in June of 1996.

166 This process is already underway. Several joint and service publications contain chapters or appendices on "legal responsibilities" or "legal considerations." *See* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 1, for a list of selected doctrinal publications. The JEL Peace Operations CD-ROM, *supra* note 12, includes the 1995 edition of the *Operational Law Handbook.* The process must be continuous and monitored with vigilance, particularly as the Army downsizes and increasingly relies on technology. Simulations are not conducive to the presentment of legal issues, and the contributions of the SJA are often not quantified. Accordingly, the Corps must continue to aggressively state its case about the role, location, and organization of judge advocates in the Force XXI Army.

167 *See, e.g.,* Major Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements,* 148 MIL. L. REV. 186 (1995).

168 With regard to engagement (and enlargement), judge advocates are involved in Expanded International Military Education and Training (*see* Martins, *supra* note 164) and "Human Rights" Training (*see* Major Jeffrey F. Addicott & Major Andrew M.

role in international military education and training. They will have a central role in stability and support operations and in building or rehabilitating systems of governance.[169] They will likely become increasingly involved in international criminal tribunals such as those established by the UN for the Former Yugoslavia and Rwanda, and in international conferences and conventions on the evolving law of armed conflict in a changing world. By their very existence, judge advocates represent the rule of law, and their continued presence in the field demonstrates the commitment of the nation—and the Army—to discipline and humanity in battle.

VII. Conclusion

The great challenges of the future are important opportunities for the Army Judge Advocate General's Corps. Its officers are members of two great professions and, as soldier-lawyers, they have unbridled potential for future service to the nation. They are, like the commanders and soldiers they serve, the best in the business. **As** operational law matures, it will increasingly define and expand the role of the Corps. Perhaps the most accurate forecast of the future of operational law—and thus of the Corps—was provided not by a judge advocate, but by a commander:

> Operational law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior **SJAs** may be as close to the commander as his operations officer or his chief of staff. . . . Operational law and international law are the future. We need an SJA who is a man or a woman for all seasons. SJAs will find themselves more and more part of the operational aspects of the business. They will be the right hand of the commander, and he will come to them for advice.[170]

Warner, ***JAG Corps Poised for New Defense Missions: Human Rights Training in Peru,*** *ARMY* **LAW.** Feb. 1991, at 78), and have the potential for increased participation in programs as diverse as the Marshall Center in Garmisch, Germany, and the ICRC's International Institute for Humanitarian Law in San Remo, Italy. As instruments of disengagement, judge advocates are significant members of training teams preparing UN, multinational, or other national headquarters to successfully accept responsibility from the United States for an ongoing mission (for example, judge advocates participated in BCTP training of the UN mission in Haiti military staff). Judge advocates also can help ensure the success of follow-on headquarters: two judge advocates have served as legal advisors to the Commander, UNMIH.

169 "Governance," or "relative good government," is a more realistic aspiration than "democracy." ***See generally*** Kishore Mahbubani, ***The West and the Rest,*** NATIONAL INTEREST, Summer 1993.

170 Lieutenant General Anthony C. Zinni, Commanding General, I **MEF,** ***The SJA in Future Operations,*** MARINE CORPS GAZETTE, Feb. 1996, at **15, 17.**

THE NEW LAW ON DEPARTMENT OF DEFENSE PERSONNEL MISSING AS A RESULT OF HOSTILE ACTION

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In my 46 years of wearing a uniform in the service of this great and wonderful nation of ours, the understanding that America, and particularly her Armed Forces, took care of our people was a fundamental premise. We pick up our wounded and get them to the best possible medical care. We recover our dead and bury them respectfully. We take care of the families of the Servicemen and women when they are sent away to do the nation's fighting. We give our veterans dignified thanks and assistance when the fighting is over. And certainly recovering our prisoners and accounting for our missing is just as important as those other points. If we ever stop doing any of those things, we have let some fundamental decay get started in the country.

—General John W. Vessey, Jr.
Former Chairman, Joint Chiefs of Staff[1]

I. Introduction

On 20 January 1995, Senator Robert Dole, the Senate Majority Leader, introduced Senate Bill 256, "The Missing Service Personnel

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1 General John W. Vessey, Jr., Remarks in a speech to the National League of POWNIA Families (Summer) 1988, *reprinted in* 134 CONG. REC. E2,736-38 (daily ed. Aug. 11, 1988).

Act of 1995."[2] The purpose of the bill was twofold. First, it would ensure that the federal government account for service members and civilian employees of both the government and government contractors missing as a result of a hostile action. Second, as a general rule, the bill would ensure that the federal government does not declare these persons dead solely because of the passage of time.3

Senator Dole's bill was not, however, the first legislation proposing changes to Department of Defense procedures on accounting for missing persons. Since 1989, members of Congress have introduced such legislation, but the legislation had never been reported out of committee in either the House of Representatives or the Senate.[4] This time, however, the powerful Senate Majority Leader sponsored the legislation and he was persistent. Senator Dole had introduced an identical bill the previous year, 1994, but Congress had not been able to consider the bill before adjournment.[5] Finally, the stage was set for significant change.

Senator Dole, introducing Senate Bill ***256,*** remarked that he sought to restore some of the Department of Defense's "credibility" on accounting for prisoners of war and those who are missing in action, and to "rebuild faith and trust between the public and our federal government."[6] To further this intent, Senator Dole proposed new procedures for determining the status of missing persons, including judicial review of certain decisions. Further, as originally introduced by the Majority Leader, Senate Bill ***256*** provided for appointment of counsel for the missing person, required access to government information and the missing person's personnel records by both family members and the boards of inquiry, and allowed certain persons to be represented by counsel at these boards.[7]

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[2] S. 256, 104th Cong., 1st Sess. (1995) [hereinafter S. 256]. Several veterans organizations supported Senator Dole's bill, including the American Legion, the Disabled American Veterans, the National Vietnam Veterans Coalition, and VietNow. ***See*** letters of support from veterans organizations attached as exhibits at 141 CONG. REC. S1,279-81 (daily ed. Jan. 20, 1995).

[3] S. 256, ***supra*** note 2, § 2.

[4] ***See, e.g.,*** H.R. 1730, 101st Cong., 1st Sess. (1989), ***reprinted in*** 135 CONG. REC. H980 (daily ed. Apr. 6, 1989); H.R. 291, 103d Cong., 1st Sess. (1993), ***reprinted in*** 139 CONG. REC. H102 (daily ed. Jan. 6, 1993).

[5] S. 2411, 103d Cong., 2d Sess. (1994), ***reprinted in*** 140 CONG. REC. S12,217 (daily ed. Aug. 19, 1994).

[6] 141 CONG. REC. S1,274-79 (daily ed. Jan. 20, 1995). Senators Lautenberg, Lieberman, and Simpson cosponsored S. 256. In his remarks upon introduction of the bill, Senator Lautenberg, who like Senator Dole is a World War II veteran, explained why he believed that the legislation was needed. Senator Lautenberg found that "when the Pentagon looks at [the problems with the current accounting procedures] they see a rosy picture." Therefore, he believed there was "a general lack of will within the Pentagon to update its management procedures regarding missing persons." *Id.* at S1,280.

[7] S. 256, ***supra*** note 2.

Less than one month after Senator Dole introduced this bill, Representative Benjamin Gilman, Chairman of the Committee on International Relations, proposed similar legislation in the House of Representatives. House Bill 945 also was entitled "The Missing Service Personnel Act of 1995."[8] He intended his legislation to "unveil the curtain of secrecy which currently surrounds any DOD decision concerning a person's status as missing in action."[9]

In June 1995, the House of Representatives Committee on National Security incorporated House Bill 945 into the House version of the National Defense Authorization Act for Fiscal Year 1996.[10] As the Committee on National Security explained:

> For years, Congress has struggled to find ways to obtain the fullest possible accounting of American service members and civilians under the employment of the Department of Defense who were listed as missing in action or became prisoners of war.
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> ....
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> This process [a specified chain of reporting and a coordinated process of inquiry] will help to resolve perhaps the greatest recurring tragedy related to unresolved cases of missing service members whose families and next of kin have experienced both frustration and anguish in trying to obtain answers from an unresponsive bureaucracy.[11]

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[8] H.R. 945, 104th Cong., 1st Sess. (1995). Congresswoman Molinari and Congressman Thurman cosponsored the bill. Additionally, Congressman Robert Dornan, Chairman of the Military Personnel Subcommittee of the Committee on National Security, House of Representatives, called House Bill 945 "39 pages of the best legislation I have ever seen." *Continuation of Remarks on 50th Anniversary of World War II*, 141 CONG. REC. H5,361 (daily ed. May 18, 1995).

[9] 141 CONG. REC. E368 (daily ed. Feb. 16, 1995). Many veterans organizations also supported H.R. 945, including the American Legion, the Vietnam Veterans of America, the National Alliance of Families, New York State POW/MIA, the American Defense Institute, VietNow, the Marine Corps League, the Live POW Lobby of America, and Task Force Omega of Colorado. *See* letters of support from veterans organizations attached as exhibits at *id.* E369-70.

[10] H.R. REP. NO. 131, 104th Cong., 1st Sess. 460-72 (1995) [hereinafter H.R. REP. NO. 131]. Representative Gilman also offered five amendments to H.R. 945, which were accepted. The amendments included: (1) a requirement that the State Department, the Transportation Department, the Central Intelligence Agency, and other relevant agencies appoint an officer responsible for handling missing person issues; (2) a requirement that the Department of Defense office coordinate with these agencies; (3) a change from 24 hours to 30 days the time allotted to a family member in responding to the Department of Defense board of inquiry; (4) an extension of the time after which the Department of Defense may terminate further review boards after first notice of a disappearance from 20 to 30 years; and (5) a provision allowing family members of a missing person the right to judicial review of any findings of death made by the board. 141 CONG. REC. H5,891 (daily ed. June 13, 1995). *See also* 141 CONG. REC. E1,255 (daily ed. June 15, 1995) (statement of Rep. Kim discussing the Gilman amendments).

[11] H.R. REP. NO. 131, *supra* note 10, at 223-24.

The Senate Committee on Armed Services also made its version of The Missing Service Personnel Act of 1995 part of the Senate version of the National Defense Authorization Act for Fiscal Year 1996.[12] The Senate Armed Services Committee had significantly amended Senator Dole's original bill, however, deleting what it identified as the most controversial provisions. For example, the Senate version no longer included civilian employees. Additionally, the Senate Armed Services Committee deleted the provisions requiring that the missing person be represented by counsel and that certain board decisions be subject to judicial review.[13] In commenting on its version of the legislation, the Senate Committee on Armed Services believed that "the recommended provision will assist the Department of Defense and the next-of-kin of missing service members as both struggle with the emotion and frustration of a system which has, to date, proved insensitive and unresponsive."[14]

Not everyone on the Senate Armed Services Committee agreed. Senator John McCain, a former prisoner of war in Vietnam,[15]

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12 S. REP. NO. 112, 104th Cong., 1st Sess. 157-75 (19951.

13 *Id*. Dismayed by the changes to S. 256, Senator Dole stated that the bill as finally reported by the Senate Committee on Armed Services was not everything that he had hoped for, but it represented all that the Senate was willing to adopt. Senator Dole noted that the Department of Defense had objections to his original bill, as did a number of Senators. Stating that there were reforms that he had hoped to achieve but which were no longer in the Senate bill, Senator Dole found that the House version of The Missing Service Personnel Act of 1995 better reflected his original bill. 141 CONG. REC. S12,534 (daily ed. Sept. 5, 1995).

14 S. REP. NO. 112, *supra* note 12, at 245.

15 The Senate Select Committee on POW/MIA Affairs wrote of Captain John S. McCain III (United States Navy):

> (Then a Lieutenant Commander)—McCain's A4E Aircraft was shot down over Hanoi in October 1967. Captain McCain ejected from an inverted aircraft and broken [sic] both arms and a leg during the ejection. North Vietnamese soldiers quickly pulled him from a lake near Hanoi and beat him severely. Near death, McCain recovered slowly. McCain's father, Admiral McCain, was then Commander of the Pacific Fleet. Lieutenant Commander McCain was singled out for repeated torture and brutal treatment. Numerous beatings, bones rebroken by his captors time and again, and months of solitary confinement further slowed recovery. The Vietnamese offered him early repatriation several times in an attempt to dishearten the other prisoners, but McCain refused to be repatriated ahead of the other POWs. His spirit could not be broken. He continued to resist his captors and to inspire other prisoners by his patriotic determination.
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> During the long internment, McCain served the other prisoners both as chaplain and an educator. As chaplain, he conducted religious services, provided spiritual guidance, and instilled constructive rehabilitative thinking for the benefit of his fellow prisoners. In addition, despite constant harassment and the routine harsh treatment, McCain devoted long hours to preparing educational lessons that would improve the morale and well-being of the other prisoners.

SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS REP. No. 1, 103d Cong., 1st Sess. 475 (1993) [herein after SENATE POW/MIA AFFAIRS REPORT].

opposed even the amended Senate language. Senator McCain did not share the committee's editorial characterization of the current accounting system as "insensitive and unresponsive."[16] While admitting that this may have been true many years ago, Senator McCain believed that the Department of Defense and the Military Services had since taken extensive measures to make the system "sensitive, responsive, and most important, workable."[17]

Undeterred, the conference committee agreed to the House version of The Missing Service Personnel Act of 1995.[18] Disappointed in the conferees' action, Senator McCain again urged his fellow Senators not to adopt the House version (now the conference version), calling it "the most egregious . . . unworkable, unnecessary, and counterproductive provisions related to missing service personnel."[19] Senator McCain believed the current Department of Defense Prisoner of War and Missing in Action Office resources and procedures were "fully adequate to accomplish the objective of determining the fate of all of our missing people."[20] Additionally, Senator

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16 141 CONG. REC. S12,534 (daily ed. Sept. 5, 1995).

17 *Id.*

18 H.R. CONF. REP. NO. 450, 104th Cong., 2d Sess. 157-75 (1996). ***See*** *also* H.R. CONF. REP. NO. 406, 104th Cong., 1st Sess. 158-76 (1995) (containing the first version of the NDAA for FY96 conference report vetoed by President Clinton in December 1995; the original report's version of The Missing Service Personnel Act of 1995 was identical to the provision finally enacted).

19 141 CONG. REC. S18,873 (daily ed. Dec. 19, 1995).

20 *Id.* Senator McCain further stated:

> The language in the conference report prohibits the review boards it establishes from making a finding that a serviceman has been killed in action if there is "any credible evidence that suggests that the person is alive." It defines [sic] logic that, even if so much time has passed that it is physically impossible for a particular unaccounted-for serviceman to be alive, the board still cannot declare him dead if "credible evidence" is offered that he is still alive.
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> In my view, this is a very broad and undefined standard. It would effectively prevent, in many cases, a determination of death, leaving the families of missing persons with unfounded hopes that their loved ones are alive and unwarranted fears for their safety and health. This is something that we clearly rejected in the original Senate bill and should not have agreed to in conference. I would point out to my colleagues that there are roughly 78,000 servicemen missing from World War II. And this is an example of a war where we walked the battlefield. It might be of interest to note as well that at the conclusion of the battle of Lexington and Concord, there were five missing minutemen. Missing servicemen are unfortunately—and very tragically—a fact of war—as much as death is a fact of war.
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> . . . .
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> The bill contains several other similar unworkable and unnecessary provisions. Among these are: a requirement that a Secretary appoint a board of review for every serviceman determined to be missing in action and subsequent review boards every 3 years for **30** years; a requirement that counsel be appointed for the missing; a requirement to subject final determinations of the Services to judicial review; the establishment of

McCain emphasized that the Department of Defense, the regional commanders-in-chief, and the Chairman of the Joint Chiefs of Staff strongly opposed the conference version.[21] By letter to Senator McCain, the Chairman of the Joint Chiefs of Staff added his "strong support to the Senate-passed version of the legislation" as it would "go a long way toward addressing the concerns of the Congress, the American People, and our military without unintended impacts we believe would be detrimental to our warfighting capability."[22]

Despite these concerns, both the House and Senate passed the conference version as part of the National Defense Authorization Act for Fiscal Year 1996. Although the President originally vetoed the Authorization Act because of budget objections on **28** December 1995, Congress revised the budget provisions of the Authorization Act and President Clinton signed it on 10 February 1996, thus enacting The Missing Service Personnel Act of 1995.[23] After years of trying, Congress finally had succeeded in passing legislation to reform the manner in which the Department of Defense accounts for its missing personnel.

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reporting requirements on commanders in the field at the very time their principal responsibility should be fighting and winning a war; and the reopening of cases from previous conflicts.

Id.

[21] *Id.*

[22] *Id.* at S18,874. General Shalikashvili wrote:

Dear Senator McCain: Thank you for taking time to meet with me last week and sharing your insights on some very important Defense issues we face now and in the coming years.

One of the issues your staff has contacted us on is the POW/MIA legislative initiative contained in the House and Senate versions of the FY96 Defense Authorization Bill now in conference committee. I'm aware that you've already heard from the regional CINCs expressing their concerns about compliance with certain difficult provisions contained in the House version.

No doubt we all agree the POW/MIA issue is of paramount importance to all Service members, and especially to all commanders. Nothing impacts a unit's fighting capability more than uncertainty over whether members will be listed as missing or forgotten if taken prisoner. This country has an unbreakable commitment to our men and women in uniform that such will not be the case. However, language in the House-passed version would create a bureaucracy requiring CINCs to divert precious manpower to this issue, in the middle of a conflict, without relieving the anxiety of our men and women.

The CINCs have addressed the details, but let me add my strong support to the Senate-passed version of the legislation that clearly advanced the POW/MIA issue. Such legislation will go a long way toward addressing the concerns of the Congress, the American people, and our military without unintended impacts we believe would be detrimental to our warfighting capability.

[23] The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 569, 110 Stat. 186 (1996)(§ 569(b)(1) to be codified at 10 U.S.C. §§ 1501-1513) [hereinafter sections of 569(b)(1) will be referred to by their Title 10, United States Code, section designations; uncodified sections of the public law will be referred to as sections of the NDAA for FY96].

Will the new law actually improve the accountability process for Department of Defense personnel missing as a result of hostile action? To answer this question, this article first examines the law as enacted. It will then review the history of American law on accounting for missing persons and the United States government's attempts to account for those missing as a result of the Vietnam Conflict. Next is an analysis of whether the new law actually improves current Department of Defense and military service policies on deciding the status of persons missing as a result of hostile action. The final section proposes changes to the new law that are necessary to clarify its meaning and provide realistic and practical procedures to improve the military's personnel accounting system.

II. The New Law on Accounting for Missing Persons[24]

The new law details a comprehensive system of accounting for missing service members and certain civilians. Reflecting the importance of the issue, the law requires the Secretary of Defense to establish within the Office of the Secretary of Defense an office with responsibility for policy, control, and oversight of the entire missing persons program.[25] Additionally, the Department of Defense must establish uniform policies throughout the Department of Defense for personnel recovery[26] and for determining a person's status.[27]

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[24] *Id.*

[25] 10 U.S.C.A. § 1501(a)(1) (West Supp. May 1996).The Senate and House conferees intended this office "to have a broad range of responsibilities that include those of all the individual offices that currently have responsibilities for POW/MIA matters." In addition:

> The conferees expect that the Secretary of Defense will organize this new office to serve as the single focal point in the Department of Defense for POW/MIA matters and consolidate the formulation and oversight of search, rescue, escape and evasion and accountability policies. The conferees further expect that the Secretary of Defense will make every effort to ensure a close working relationship with the national intelligence agencies.

H.R. CONF. REP. No. 450, *supra* note 18, at 801.

The office also is responsible for coordinating with other Department of Defense offices and all departments and agencies of the Federal Government. 10 U.S.C. § 1501(a)(1)-(2). In addition, the new law requires the Secretary of Transportation to designate an officer of the Department of Transportation to have responsibility within that department for matters relating to missing Coast Guard members. *Id.* § 1510(a).

[26] 10 U.S.C.A. § 1501(a)(3) (West Supp. May 1996). Personnel recovery includes search, rescue, escape, and evasion. *Id.*

[27] *Id.* § 1501(b)(1). The law also requires the systematic, comprehensive, and timely collection, analysis, review, dissemination, and periodic update of information related to missing persons. *Id.* § 1501(b)(1)(B). Moreover, the Secretary of Defense must prescribe these procedures in a single directive applicable to all elements of the Department of Defense. *Id.* § 1501(b)(3). The Secretary of Transportation also must prescribe procedures similar to those required of the Secretary of Defense. *Id.*

To understand the new rules, and the controversy surrounding their enactment, it is first appropriate to review the new law itself. Only after such a review can one fully appreciate the law's impact on the Department of Defense and its ability to exercise discretion in accounting for persons during hostile actions. For the judge advocate and civilian attorney, this review illustrates that counsel must be thoroughly versed in the law's detailed investigative requirements.

A. Purpose and Applicability

The purpose of the Missing Service Personnel Act of 1995 is to ensure that an individual "who becomes missing or unaccounted for is ultimately accounted for . . . and, as a general rule, is not declared dead solely because of the passage of time."[28] The law applies to service members on active duty who become involuntarily absent only as a result of a hostile action or under circumstances suggesting that the absence resulted from a hostile action. The law also applies to civilian employees of the Department of Defense, and employees of Department of Defense contractors who serve with or accompany the United States Armed Forces in the field and become involuntarily absent under similar circumstances.[29]

B. Beneficiaries

The law entitles particular individuals to certain rights and benefits because of their relationship to the missing person. These persons include the "primary next of kin" and "other members of the immediate family." The missing person's primary next of kin is the individual authorized by law to direct disposition of the person's remains. "Primary next of kin" include a spouse, a blood relative, an adoptive relative, or a person standing in loco parentis to the miss-

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§ 1510(b). Additionally, the Secretary of Defense may delegate any responsibility under the law to the Service Secretary. *Id.* § 1501(b)(2). Furthermore, the Secretary of Defense has the authority to provide for extensions, on a case-by-case basis, of any time limit prescribed by the law. *Id.* § 1501(b)(4).

[28] The NDAA for FY96, *supra* note 23, § 569(a).

[29] 10 U.S.C.A. § 1501(c) (West Supp. May 1996). As originally introduced by Senator Dole, The Missing Service Personnel Act of 1995 applied to all federal government employees. S. 256, *supra* note 2, § 3(a). Instead, the NDAA for FY96, *supra* note 23, § 569(e), requires the Secretary of State to conduct a comprehensive study of current personnel accounting procedures for federal government employees (other than employees of the Department of Defense covered by the new law) to determine whether those procedures may be improved. The law also requires the Secretary of State to submit to the Senate Committee on Armed Services and the House National Security Committee a report on the study within one year after the date of the enactment of the NDAA for FY96 on February 10, 1996. *Id.* § 569(e)(4).

ing person.[30] "Other members of the immediate family" include children, parents and siblings.[31]

The law also requires that on enlistment or appointment a service member must specify in writing the person, if any, whom the service member wishes to receive information on their whereabouts and status. This person, called the "previously designated person,'' must be someone other than the service member's primary next of kin or immediate family member. Periodically, and whenever the service member is deployed as part of a contingency operation, the Service Secretary must require the service member to reconfirm or modify the previously designated person.[32]

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[30] 10 U.S.C.A. § 1513(4) (West Supp. May 1996) defines "primary next of kin" to mean the individual authorized to direct disposition of the person's remains under 10 U.S.C. § 1482(c) (1988). Section 1482(c) provides:

> Only the following persons may be designated to direct disposition of the remains of a decedent covered by this chapter:
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> (1) The surviving spouse of the decedent.
>
> (2) Blood relatives of the decedent.
>
> (3) Adoptive relatives of the decedent.
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> (4) If no person covered by clauses (1)-(3) can be found, a person standing in loco parentis to the decedent.

Additionally, the new law allows the primary next of kin to designate another individual to act on his or her behalf as primary next of kin. The Secretary concerned must treat this designated individual as if that individual were the primary next of kin. The primary next of kin may revoke the designation at any time. *Id.* § 1501(d).

[31] 10 U.S.C.A. § 1513(5) (West Supp. May 1996) defines "immediate family member" to mean:

> (a) The spouse of the person.
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> (b) A natural child, adopted child, stepchild, or illegitimate child (if acknowledged by the person or parenthood has been established by a court of competent jurisdiction) of the person except that if such child has not attained the age of 18 years, the term means a surviving parent or legal guardian of such child.
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> (c) A biological parent of the person, unless legal custody of the person by the parent has been previously terminated by reason of a court decree or otherwise under law and not restored.
>
> (d) A brother or sister of the person, if such brother or sister has attained the age of 18 years.
>
> (e) Any other blood relative or adoptive relative of the person, if such relative was given sole legal custody of the person by a court decree or otherwise under law before the person attained the age of 18 years and such custody was not subsequently terminated before that time.

[32] *Id.* § 1513(6) defines a "previously designated person" to mean "a person designated by the missing person under section 655 of title 10, United Stated Code." The **NDAA** for FY96, *supra* note **23,** § 569(d) amends chapter 37 of Title 10, United States Code by adding section 655, entitled "Designation of persons having interest in status of a missing member." This new section provides:

> (a) The Secretary concerned shall, upon the enlistment or appointment of a person in the armed forces, require that the person specify in writing the person or persons, if any, other than the person's primary next of kin or immediate family, to whom information on the whereabouts and status of the member shall be provided if such whereabouts and status

C. Pay and Allowances

The law provides for the payment of pay and allowances to all persons in a missing status or those declared dead and later found alive and returned to the control of the United States, except those subsequently determined to have been absent without leave or deserters.[33] Therefore, once declared missing, a person continues to accrue pay and allowances until that status is formally changed by the Service Secretary. The law also amends provisions of the Missing Persons Act[34] by including persons placed in a missing status under the new law.[35] Therefore, under the new law, a missing person's dependents may receive allotments of the missing person's pay and allowances during the period that the individual is in a missing status.[36]

D. Immediate Commander's Initial Report

The law requires that the immediate commander[37] conduct the first inquiry into the missing person's whereabouts. The commander must conduct this inquiry, called a preliminary assessment, any time that the commander receives information that the whereabouts of a person covered by the law are uncertain and that the person is, or may be, involuntarily absent as a result of a hostile action. If the commander decides that the person is missing, the commander must recommend that the person be placed in a "missing status."[38] To be placed in a missing status, a person must be absent in one of the following categories: missing, missing in action, captured, beleaguered, besieged, interned in a foreign country, or detained in a foreign country against that person's will.[39]

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are investigated under chapter 76 of this title [the new law]. The Secretary shall periodically, and whenever the member is deployed as part of a contingency operation or in other circumstances specified by the Secretary, require that such designation be reconfirmed, or modified, by the member.

(b) The Secretary concerned shall, upon the request of a member, permit the member to revise the person or persons specified by the member under subsection (a) at any time. Any such revision shall be in writing.

33 10 U.S.C.A. § 1511(a) (West Supp. May 1996).

34 37 U.S.C. §§ 551-59 (1988 & Supp. V 1993).

35 The NDAA for FY96, *supra* note 23, § 569(c).

36 37 U.S.C. § 553 (1988 & Supp. V 1993), *amended by* the NDAA for FY96, *supra* note 23, § 569(c)(3).

37 *See* 10 U.S.C.A. § 1502(a) (West Supp. May 1996) (defining "immediate commander" as "the commander of the unit, facility, or area to or in which the person is assigned).

38 *Id.* § 1502(a).

39 *Id.* § 1513(2).

Once the immediate commander decides that the person should be placed in a missing status, he must forward a report containing that recommendation to the theater component commander having jurisdiction over the missing person.[40] Implicitly, then, if the immediate commander decides that the person's absence does not fit one of the missing status categories, the law does not require the commander to submit a report to the theater component commander. For example, the commander may decide that the person is voluntarily absent, such as absent without leave, or that the person is deceased.

No later than fourteen days after the theater component commander receives the immediate commander's report, he must forward it to the Secretary of Defense or the Service Secretary following Department of Defense procedures.[41] The theater component commander must certify in the report that he is taking "all necessary actions" and using "all appropriate assets" to resolve the person's status.[42] The law does not require, however, that the theater component commander make any recommendation as to the status of the missing person.

E. The Service Secretary's Initial Determination *of* Status

No later than ten days after receiving the immediate commander's recommendation through the theater component commander, the Service Secretary must appoint a board to conduct an inquiry into the person's whereabouts.[43] If more than one person's status is related, one board may inquire into the whereabouts of all such persons.[44]

1. Board Composition and Mission—The board must be composed of at least one individual who has experience and understanding in military operations similar to those in which the person disappeared. The board member must be a military officer in the case of a missing service member or a civilian in the case of a missing civilian employee. The individual also must possess a security clearance that affords him access to all information relating to the whereabouts of the person.[45]

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[40] *Id.* § 1502(a). This section requires that the immediate commander transmit the report within 48 hours from receipt of the initial information that the person's whereabouts is unknown.

[41] Id. § 1501(b). The law defines the "theater component commander" to mean, "with respect to any of the combatant commands, an officer of any of the armed forces who **(A)** is commander of all forces of that armed force assigned to that combatant command, and (B) is directly subordinate to the commander of the combatant command." *Id.* § 1513(8).

[42] Id. § 1502(b).

[43] Id. § 1503(a).

[44] Id. § 1503(b).

[45] *Id.* § 1503(c)(1)-(3).

This board must "collect, develop, and investigate all facts and evidence" relating to the person's status,[46] including actions taken to find the person,[47] and must maintain a record of its proceedings.[48] The board must analyze the facts and evidence, make findings based on that analysis, and "draw conclusions" as to the whereabouts and status of the absent person.[49]

2. Assignment *of* Attorneys—The Service Secretary must assign to the board a judge advocate, or a civilian attorney, to provide "legal counsel." This attorney must have "expertise" in the law relating to missing persons, including death determinations and rights of family members and dependents.[50] **A** point of controversy is the additional requirement that the Secretary appoint a "missing person's counsel" to represent the missing person. If the inquiry involves two or more individuals, a single attorney may represent them all.[51] This attorney represents only the interest of the missing individual, not any member of that individual's family or any other interested parties.[52] The missing person's counsel must be qualified under Article 27(b) of the Uniform Code of Military Justice[53] and must have a security clearance affording the counsel access to all information relating to the whereabouts of the person. Similar to the counsel appointed to advise the board, the missing person's counsel also must have "expertise" in the law relating to missing persons.[54]

The board of inquiry must ensure that the missing person's counsel has complete access to the board proceedings, including all information considered by the board. The counsel must observe all official activities of the board and may question witnesses before the board.[55] The law also requires that the missing person's counsel assume some duties ordinarily those of the attorney appointed to advise an administrative board. For example, the counsel must "assist the board" in ensuring appropriate information is "collected, logged, filed and safeguarded."[56] Further, the missing person's coun-

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46 *Id.* § 1503(d)(1).

47 *Id.* § 1503(e)(2).

48 *Id.* § 1503(e)(3). ***See*** *also id.* § 1503(e)(1) (specifically requiring the board to "collect, record, and safeguard all facts, documents, statements, photographs, tapes. messages, maps, sketches, reports, and other information (whether classified or unclassified)").

49 *Id.* § 1503(d)(3).

50 *Id.* § 1503(c)(4).

51 *Id.* § 1503(f)(1).

52 *Id.*

53 UCMJ art. 27(b) (1988).

54 10 U.S.C.A. § 1503(f)(2) (West Supp. May 1996).

55 *Id.* § 1503(f)(3).

56 *Id.* § 1503(f)(4).

sel must monitor the board deliberations.[57] Finally, the missing person's counsel must submit a written review of the board report to the Service Secretary.[58]

3. Access to Proceedings—All board proceedings are closed to the public, including the person's primary next of kin, other members of the immediate family, and any other previously designated person.[59]

4. Board Recommendation and Report—The board must make a recommendation to the Service Secretary that the person be placed in a missing status, be declared to have deserted, be declared absent without leave, or be declared dead.[60] To declare a person dead, the board must find: **(1)** "credible evidence" suggesting that the person is dead, **(2)** "no credible evidence" suggesting that the person is alive, and **(3)** that United States representatives have made a complete search of the area where the person was last seen and have examined the records of the government or entity with control of that area, unless after making a good faith effort the representatives are not granted such access.[61] Additionally, if the board recommends that a person be declared dead, the law requires the board to include in its report: **(1)** a detailed description of the location where death occurred and the location of the body if recovered, (2) a statement of the date of death, and **(3)** if the body was not visually identifiable, a certification from a "practitioner of an appropriate forensic science" that the body is that of the missing person.[62]

The board must then submit to the Service Secretary a detailed board report not later than thirty days after the board is appointed.63 The board report must include the facts and evidence considered, the recommendation, and a statement as to whether the board used classified information in forming its recommendations.64

5. Action *by* the Service Secretary—After receipt of the board recommendation, the Service Secretary must make one of four determinations: (1) declare the person missing,[65] (2) declare the person

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[57] *Id.* § 1503(f)(3)(D).

[58] *Id.* § 1503(f)(5).

[59] *Id.* § 1503(g).

[60] *Id.* § 1503(d)(4).

[61] *Id.* § 1507(a)(1)-(3).

[62] *Id.* § 1507(b)(1)-(4).

[63] *Id.* § 1507(h)(2).

[64] *Id.* § 1503(h)(1).

[65] If the Secretary determines a person to be "missing," that person enters a "missing status," that is, missing, missing in action, interned in a foreign country, captured, beleaguered, besieged, or detained in a foreign country against that person's will. *Id.* § 1513(1)-(2).

absent without leave, (3) declare the person a deserter, or (4) declare the person dead.[66] The law prohibits the Secretary from making a board report public until one year after the date the board of inquiry submitted its report.[67] As an exception, however, the Secretary must provide the board report, including the names of the board members and any unclassified summary of the immediate commander's report, to the primary next of kin and other members of the immediate family and any other previously designated person. The Secretary also must inform these individuals that the United States will conduct a subsequent review on or about one year after the date of the first official notice of the disappearance of the person, unless information is available sooner that may result in a change in status.[68]

F. Subsequent Boards of Inquiry

The Service Secretary also must conduct a "subsequent board" into the whereabouts of a person,[69] which may combine its inquiries if the absences of two or more persons are factually related.[70] A subsequent board is required under two circumstances.

First, the Secretary must appoint a board if, within one year of the date the immediate commander transmitted his report to the theater component commander, information becomes available that may change a person's status.[71] Persons whose status are subject to review under this requirement are those who were the subject of an initial determination by the Secretary concerned.[72] Consequently, the Secretary must convene a subsequent board based on new information regarding *any* person who was the subject of an initial board of inquiry, not just those whom the Secretary placed in a missing status.

Second, the Secretary must appoint a board to inquire "into the whereabouts and status of a missing person" on or about one year after the date the immediate commander transmitted his report to the theater component commander.[73] Arguably, because the law uses the term "missing person," this provision may be interpreted as applying only to individuals placed in a missing status. Two other provisions indicate, however, that the law requires a Secretary to conduct the one-year inquiry into the status of any person who was

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66 *Id.* § 1503(i)(3).
67 *Id.* § 1503(h)(3).
68 *Id.* § 1503(j).
69 *Id.* § 1504(b).
70 *Id.* § 1504(c).
71 *Id.* § 1504(a).
72 *Id.*
73 *Id.* § 1504(b).

the subject of an initial determination. First, the subsequent board of inquiry is not limited to those in a missing status if additional information is discovered within the one-year time period. Next, the Secretary must inform certain family members of all individuals who were the subject of an initial determination, not just family members of those placed in a missing status, "that the United States will conduct a subsequent inquiry . . . on or about one year after the date of the first official notice of the disappearance of that person."[74] The better interpretation of this provision is that the law requires a board at the one-year period for all individuals who were the subject of an initial determination. Additionally, the law contains no exception to the requirement to appoint a board on or about the one-year time period. Consequently, the law appears to require the one-year subsequent inquiry *even if* the Secretary has recently conducted such a board based on the receipt of additional information.

1. Board *Composition* and Mission — Although the initial board may be composed of only one member, the subsequent boards of inquiry must have at least three members, including a board president.[75] Only the president is required to have a security clearance that affords access to all information relating to the person.[76] Additionally, one board member must have an occupational specialty similar to the missing person's[77] and have an understanding and expertise in activities similar to those in which the person was engaged when he or she disappeared.[78]

The subsequent board of inquiry must review all previous reports,[79] collect and evaluate any information on the whereabouts and status of the person that has become available since the original status determination,[80] and "draw conclusions" as to the status of the person.[81] Additionally, the board may secure directly from any agency of the United States all information that it considers neces-

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74 *Id.* § 1503(j)(2).

75 *Id.* § 1504(d)(1)-(2). If the board is inquiring into only the status of service members, the law requires the board to be composed of officers in the grade of major or lieutenant commander, or above. If the case is only about civilians, the board must be composed of not less than three Department of Defense employees in the grade of GS-13 or higher; service members also may serve on these boards. If the board is considering both service members and civilians, the board must consist of at least one officer and one employee of the Department of Defense. The remaining board members should be in a ratio roughly proportional to the ratio of the number of service members and civilians being considered. *Id.* § 1504(d)(1).

76 *Id.* § 1504(d)(2).

77 *Id.* § 1504(d)(3)(A).

78 *Id.* § 1504(d)(3)(B).

79 *Id.* § 1504(e)(1).

80 *Id.* § 1504(e)(2).

81 *Id.* § 1504(e)(3).

sary to conduct the proceedings.[82] In releasing the information, the agency head must declassify information, or release the information in a manner not requiring the removal of markings indicating the classified nature of the information. If the agency cannot remove or summarize the classified information, the agency must make the classified information available only to the board president and the counsel for the missing person.[83]

2. Assignment *of Attorneys*—The Secretary must assign a judge advocate, or appoint a civilian attorney, with the same qualifications as those for the original board of inquiry. Again, the counsel is to provide legal advice to the board.[84] The Secretary also must appoint a "counsel for the missing person'' with the same qualifications and duties as specified in the original board of inquiry.[85]

3. Access to the *Public*—Unlike the original board of inquiry, the primary next of kin, other members of the immediate family, and any other previously designated person may attend the subsequent board proceedings.86 Board proceedings at which classified information is discussed, however, are closed to persons not having appropriate security clearances.[87] Additionally, the primary next of kin and the previously designated person may attend the board with private counsel.[88] These individuals and other members of the immediate family must have access to the person's personnel file, unclassified reports of prior boards, and other information.[89] Additionally, all of these individuals may present information at the board proceedings and may submit written objections to a board recommendation.[90]

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[82] *Id.* § 1504(h)(1).

[83] *Id.* § 1504(h)(2), (3)(A)

[84] *Id.* § 1504(d)(4). ***See*** *also* *id.* § 1503(c)(4) and discussion *supra* pt. II.E.(2) (regarding the qualifications of the counsel to the board).

[85] *Id.* § 1504(f). ***See*** *also* *id.* § 1503(f) and discussion *supra* pt. II.E.2. (regarding the qualifications of the missing person's counsel).

[86] *Id.* § 1504(g). At least 60 days prior to the proceedings, the Secretary must take reasonable action to notify these individuals that they may attend the proceedings. *Id.* § 1504(g)(2). Moreover, an individual must notify the Secretary of his intent to attend the board proceedings at least 21 days prior to the Proceedings. *Id.* § 1504(g)(3). Additionally, these individuals may not be reimbursed by the United States for any costs incurred in attending such proceedings, including travel, lodging, meals, local transportation, legal fees, transcription costs, and witness expenses. *Id.* § 1504(g)(6).

[87] *Id.* § 1504(h)(3)(B).

[88] *Id.* § 1504(g)(4)(A). ***See*** *supra* notes 30, 32 for the definition of "primary next of kin" and "previously designated person," respectively.

[89] *Id.* § 1504(g)(4)(B).

[90] *Id.* § 1504(g)(4)(C)-(D). The board must attach these objections to the board recommendation. *Id.* § 1504(g)(5)(B).

4. Board Recommendation and Report—The board must recommend whether the person's status be continued or changed,[91] but may not recommend that a person be declared dead unless the board makes specific findings similar to those required of an original board of inquiry.[92] The board then must forward a report to the Secretary containing its findings, conclusions, and recommendations on status.[93]

5. Action *by* the Service Secretary—No later than thirty days after receiving the report, the Secretary must review the board report, the report submitted by counsel for the missing person, and any objections to the report.[94] After determining the report to be complete and free of errors, the Secretary must make a determination concerning the missing person's status.[95] Additionally, no later than sixty days after making a determination, the Secretary must provide the board report to the primary next of kin, other members of the immediate family and other previously designated persons.[96] If the Secretary continues the person in a missing status, the Secretary must notify these individuals that the United States will conduct further reviews into the whereabouts of the missing person.[97]

G. Further Reviews

Further review boards must be appointed to inquire into the whereabouts of any person in a missing status as a result of a subsequent board of inquiry.[98] These further review boards are governed by the same procedures as those of the subsequent boards of inquiry discussed above.[99] The Secretary must appoint a further review board under two conditions.

First, if the missing person "was last known to be alive" or "was last suspected of being alive," a board is required on or about three years after the date of the initial report of the disappearance and no later than every three years thereafter.[100] A board is not

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91 *Id.* § 1504(e)(4).

92 *Id.* § 1504(i)(2). ***See also id.*** § 1507 and discussion *supra* pt. II.E.4 (regarding the standard of proof necessary to declare a person to be dead).

93 *Id.* § 1504(e)(5), (i)(1). The report also must include the evidence considered by the board. *Id.* § 1504(j).

94 *Id.* § 1504(k)(1).

95 *Id.* § 1504(k)(3).

96 *Id.* § 1504(l)(1).

97 *Id.* § 1504(l)(2).

98 *Id.* § 1505(a).

99 *Id.* § 1505(d).

100 *Id.* § 1505(b).

required, however, after thirty years from the initial report of the disappearance or if the Secretary accounts for the person.[101]

Second, if at any time the Secretary receives information that may result in a change in status of the missing person, the Secretary must appoint a further review board.[102] Unlike the subsequent board of inquiry, the law specifically provides that if the Secretary appoints a further review board under these circumstances, the time for the next three-year further review board is determined from the date of the receipt of that information.[103]

H. Discovery of Additional Evidence

All government agencies, and specifically United States intelligence agencies, must forward to the Department of Defense office established by the new law all information that may relate to a missing person.[104] The Secretary must add this information to the missing person's case file and must notify the counsel for the missing person, the primary next of kin, and any previously designated person of the existence of the information.[105] The head of the Defense office established by the law, with the advice of the missing person's counsel, must determine whether the information is significant enough to require a further review board.[106]

I. Personnel Files

The law also provides comprehensive requirements on maintaining a missing person's personnel file. The Service Secretary must, "to the maximum extent practicable," ensure that personnel files contain all information possessed by the United States relating to the person's whereabouts.[107] The only exceptions pertain to classified information, the Privacy Act,[108] and confidential debriefing reports.[109]

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101 *Id.* § 1505(b)(3). The law defines the term "accounted for," with respect to a person in a missing status, to mean that the person is returned alive to United States control, the person's remains are recovered, or credible evidence exists to support another determination of the person's status. *Id.* § 1513(3).

102 *Id.* § 1505(b)(2).

103 *Id.*

104 *Id.* § 1505(c)(1).

105 *Id.* § 1505(c)(2).

106 *Id.* § 1505(c)(3).

107 *Id.* § 1506(a). In addition, the law provides that any person who wrongfully withholds such information shall be fined as provided in Title 18, United States Code, or imprisoned not more than one year, or both. *Id.* § 1506(e).

108 5 U.S.C. § 552a (1988).

109 10 U.S.C.A. § 1506(b)-(d) (West Supp. May 19961. The Secretary concerned may withhold classified information from a personnel file. The file must, however, contain a notice that the withheld information exists and a notice of the date of the most recent review of that information. *Id.* § 1506(b). Additionally, the Secretary must maintain the file in accordance with the Privacy Act. On request, the Secretary must,

J. Special Interest Cases

Of some controversy are the law's special rules for those service members and civilian employees who are "unaccounted for" as a result of a hostile action during the Korean Conflict, the Indochina War era, and the Cold War era.[110] The law requires any United States intelligence agency, any Department of Defense agency, the primary next of kin, other members of the immediate family, and other previously designated persons, to forward to the Secretary of Defense any new information that could change the status of such a person with a request to conduct an evaluation of the information.[111] The Secretary of Defense then must determine whether the information is significant enough to require a review board. If so, the Service Secretary must conduct the inquiry under the provisions for a further review board.[112]

K. Judicial Review

Finally, the law contains another controversial provision allowing judicial review in a United States district court.[113] Only the primary next of kin or previously designated person may maintain an action in district court. The law authorizes judicial review only for a

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however, make the personnel file available to the primary next of kin, the other members of the immediate family, or any other previously designated person. *Id.* § 1506(c). Finally, the Secretary may withhold all debriefing reports provided by missing persons returned to United States control that were obtained on a promise of confidentiality. If such a report contains nonderogatory information about the whereabouts of a missing person, the Secretary must prepare an extract of that information. After review by the source, the Secretary must place the extract in the missing person's personnel file. If the Secretary withholds a debriefing report, the missing person's personnel file must contain a notice that the information exists. *Id.* § 1506(d).

110 *Id.* § 1509. With respect to the Korean Conflict, the law includes any unaccounted for person who was classified as a prisoner of war or as missing in action during the Korean Conflict who was known or suspected to be alive at the end of the conflict, or was classified as missing in action and whose capture was possible. *Id.* § 1509(b)(1). The term "Korean Conflict" means "a period beginning on June 27, 1950, and ending on January 31, 1955." *Id.* § 1509(d)(1). The law also includes any unaccounted for person who was classified as a prisoner of war or missing in action during the Indochina War Era. *Id.* § 1509(b)(3). The term "Indochina War Era" means "the period beginning on July 8, 1959, and ending on May 15, 1975." *Id.* § 1509(d)(3). Finally, the law applies to any unaccounted for person who was engaged in intelligence operations during the Cold War. *Id.* § 1509(b)(2). The term "Cold War" means "the period beginning on September 2, 1945 and ending on August 21, 1991." *Id.* § 1509(d)(2).

111 *Id.* 5 1509(a).

112 ***Id.*** The case of a person initially classified as "killed in action/body not recovered [hereinafter KIA/BNR], however, may be reviewed only if the new information is "compelling." *Id.* § 1509(c). The House and Senate conferees explained that "compelling evidence" was meant to include such evidence as "post-incident letters written by the supposedly-dead person while in captivity or United States or other archival evidence that directly contradicts earlier United States Government determinations." **H.R.** CONF. **REP.** No. 450, *supra* note 18, at 801.

113 *Id.* § 1508(a).

finding of death by a subsequent or further review board or a finding by a board that confirms that a missing person formerly declared dead is in fact dead.[114] Additionally, the law authorizes judicial review only on the basis of information that could affect the missing person's status "that was not adequately considered" by the board concerned.[115]

As this summary demonstrates, Congress has provided a level of detailed management of Department of Defense operations found in few other codified laws on the military.[116] To explain why some in Congress believed it is necessary to enact such detailed legislation on accounting for missing persons, the next two sections review the history of military personnel accounting, including the law and implementing Department of Defense procedures.

III. Prior Laws Relating to Missing Persons

From our country's earliest history, Congress has enacted laws addressing missing service members. Significantly different from the new law, however, these laws reflect Congress's concern not with providing detailed accounting requirements, but with continuing payment of pay and allowances to missing individuals and their families. This section explores these laws, including the Missing Persons Act, now codified at chapter 10, title 37, United States Code.

A. Early American Laws on Payments to Missing Service Members

Congress enacted the first law on payments to missing service members in 1799. This law provided payments of pay and wages to seamen who were captured by the enemy until they returned to United States control or until they died, whichever came first.[117] Congress amended this provision one year later in 1800, expanding

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114 *Id.* § 1508(b).

115 *Id.* § 1508(a).

116 *See* Title 10, United States Code (Armed Forces).

117 Act of March 2, 1799, ch. 24, § 4, 1 Stat. 709, 714-15, *repealed by* Act of April 23, 1800, ch. 33, § 4, 2 Stat. 45, 52, provided:

> That all the pay and wages of such officers and seamen of any of the ships of the United States as are taken by the enemy, and upon inquiry at a court martial, shall appear by the sentence of the said court, to have done their utmost to defend the ship or ships, and since the taking thereof, to have behaved themselves obediently to their superior officers, according to the discipline of the navy, and the said articles and orders, herein before established, shall continue and go on as aforesaid. until they be exchanged and discharged, or until they shall die, whichever may first happen: *Provided always*, that persons flying from justice shall be tried and punished for so doing.

those covered under the law from seamen who were taken by "the enemy," to those taken by "an enemy."[118]

The Court of Claims used this seemingly insignificant change to find that the law applied to an American seaman impressed into the British Navy during a period when the United States was not at war with Great Britain.[119] The Court of Claims noted that when Congress changed the language of the 1799 law from "the enemy" to "an enemy" in 1800, it must have done so for some legislative purpose. That purpose, the Court of Claims found, was to provide for engagements with pirates, then common in American seas, and to provide for such cases as the one before it, where an American ship had been fired upon and forced to surrender to a British man-o-war.[120]

Congress did not pass a similar law for the Army until **1814.** Not only did that law also provide for payment of pay and allowances to soldiers who were captured by the enemy, it authorized such payments to continue notwithstanding the expiration of a

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118 Act of April 23, 1800, ch. 33, § **4, 2** Stat. **45,** 52, provided:

> That all the pay and emoluments of such officers and men, of any of the ships or vessels of the United States taken by an enemy, who shall appear by the sentence of a court martial, or otherwise, to have done their utmost to preserve and defend their ship or vessel, and, after the taking thereof, have behaved themselves obediently to their superiors, agreeably to the discipline of the navy, shall go on and be paid them until their death, exchange, or discharge.

Congress re-enacted the Navy statute without substantive changes in 1862, in Act of July 17, 1862, ch. 204, § 15, 12 Stat. 600, 609. The new law provided:

> The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them until their exchange, discharge, or death.

119 ***See*** Straughan's Case, 1 Ct. Cl. 324 (1865). This case involved an action by the widow of Seaman John Straughan to recover his pay and rations for the five-year period that he was held by the British. In 1807, Seaman Straughan and three other Americans were serving on the American frigate, the Chesapeake, when it was fired upon by the British man-0-war, the Leopard. After the Chesapeake surrendered, the British seized the four men because the British considered them to be deserters, as they had escaped from British men-0-war after being forcibly impressed into service thereon. After five years of diplomatic wrangling, the British returned two of the four men, including Straughan. The other two men never returned; one died in captivity and the other was hung as a deserter.

Initially, the Attorney General disallowed Mrs. Straughan's claim, finding that Britain was not "an enemy" within the meaning of the law. ***5*** Op. Att'y Gen. 185 (1849). The Court of Claims disagreed. They found that when a warship deliberately fires on the flag of another government, it is an act of war. *Straughan's Case,* 1 Ct. Cl. at 329.

120 *Straughan's Case,* 1 Ct. Cl. at 330.

soldier's term of service while in captivity.[121] During the American Civil War, these laws allowed Congress to routinely appropriate money to pay the salaries of prisoners of war held by the Confederacy.[122] In 1862, Congress authorized the Secretary of War to obtain from these prisoners of war allotment payments for families or friends.[123]

One question that arose during this time was whether the law required payments to continue after the Army dismissed an officer who was a prisoner of war for the offense of being captured. In 1868, the Court of Claims decided that the law required payments to continue under the circumstances in Lieutenant Jones *Case*.[124] Prior to that decision, the Army denied such payments after discharging an officer held as a prisoner of war for being captured. The Court of Claims found, however, that even though the War Department had the authority to dismiss an officer, the 1814 law allowed the officer to receive his pay notwithstanding the expiration of his term of service.[125]

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[121] Act of March 30, 1814, ch. 37, § 14, 3 Stat. 113, 115, provided:

> That every non-commissioned officer and private of the Army, or officer, non-commissioned officer, and private of any militia or volunteer corps, in the service of the United States, who has been, or who may be captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled whilst in the actual service of the United States: *Provided,* That nothing herein contained shall be construed to entitle any prisoner of war, of the militia, to the pay and compensation herein provided after the date of his parole, other than the traveling expenses allowed by law.

[122] In 1862, Congress appropriated $3,373,728 "for supplies, transportation, and care of prisoners of war," Act of July 5, 1862, ch. 133, § 1, 12 Stat. 505, 507; in 1863, for the same purpose, $1,500,000, Act of February 9, 1863, ch. 25, § 1, 12 Stat. 642, 644; in 1864, $900,000, Act of June 15, 1864, ch. 124, § 128, 13 Stat. 126, 128; and in 1865, $1,000,000, Act of March 3, 1865, ch. 81, § 1, 13 Stat. 495, 496. Also, in 1866, Congress by joint resolution provided for the commutation of rations of prisoners of war, and payment thereof to the prisoner upon his release, Act of July 25, 1866, res. 74, 14 Stat. 364. Further, in 1867, Congress authorized payments to the service member's heirs in case of his death, either before or after his return, Act of March 2, 1867, ch. 145, § 3, 14 Stat. 422, 423.

[123] Act of February 6, 1862, res. 9, 12 Stat. 613.

[124] 4 Ct. Cl. 197 11868). During the American Civil War, the South had captured Lieutenant Jones and held him in a prisoner of war camp. After his release, Lieutenant Jones made a claim for his pay and allowances that accrued during his captivity. Because the Army had discharged him while in captivity for the offense of being captured, the Army denied his claim for the period after his discharge.

[125] *Id.* at 203. The government had argued that this construction would lead to unworthy officers and soldiers receiving their pay after capture, even if they remained with and aided the enemy. The court rejected this argument, noting that the Articles of War provided authority for forfeiting the pay of such men; if Lieutenant Jones had been guilty of such an offense, he could have been convicted and punished, including the forfeiture of pay. The court further rejected the government's argument that an officer's "term of service" did not "expire" in the sense in which the terms were used in the statute when the Army dismissed an officer. *Id.* at 203-04.

In 1874, Congress codified both the Army and Navy provisions at revised statutes, sections 1288 and 1575, respectively. Congress did not repeal these laws until 1962.[126]

B. The Missing Persons Act[127]

Not until the Second World War did Congress enact laws providing for payment of pay and allowances to missing service members other than those known to have been captured by an enemy. Prior to this time, the War Department held a service member's pay and allowances, and stopped all allotments, when he was reported missing in action. As long as the service member remained missing, and not officially declared dead, the law did not allow the family to collect the six months' death gratuity.[128] As one would expect, this caused the person's family much financial hardship. In 1942, the Navy introduced legislation to assist in providing for the families of the growing number of personnel reported as missing in the European and Pacific Theaters. As a result, Congress enacted the Missing Persons Act, intended to be a temporary measure, addressing a missing person's pay and allowances and his allotments.[129]

1. Applicability — As originally enacted, the Missing Persons Act applied to commissioned and warrant officers, enlisted members in the active service, and civilian officers and employees of federal departments when they were assigned for duty outside the continental United States or Alaska.[130] The Missing Persons Act covered all such persons who were missing, missing in action, interned in a

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126 Act of September 7, 1962, Pub. L. No. 87-649, § 14, 76 Stat. 451, 498.

127 Missing Persons Act, ch. 166, 56 Stat. 143 (1942) (current version at 37 U.S.C. §§ 551-59 (1988 & Supp. V 1993) and 5 U.S.C. §§ 5561-69 (1988 & Supp. V 1993))[hereinafter Missing Persons Act]. Congress amended the act in 1944 to provide that the act should be called the "Missing Persons Act." Act of July 1, 1944, ch. 371, sec. 7, § 19, 58 Stat. 679, 681.

128 H.R. REP. No. 1680, 77th Cong., 2d Sess. 3, 5 (1942), *reprinted in* Bell v. United States, 366 U.S. 393, 408 n.20 (1961).

129 *Id.*

130 Missing Persons Act, *supra* note 127, § 1(a) (current version at 37 U.S.C. § 552 (1988 & Supp. V 1993) and 5 U.S.C. § 5561(2) (1988). The original act also applied to commissioned officers of the Coast and Geodetic Survey and the Public Health Service. *Id.* By Act of August 29, 1957, PUB. L. NO. 85-217, sec. (b), § 2, 71 Stat. 491, Congress amended the act to include service members performing full-time training duty, full-time duty, or inactive duty training. This amendment ensured that service members performing other types of duty would be entitled to the pay and allowances that they would have had, had they been on active duty at the time that they entered a missing status. S. REP. No. 970, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S.C.C.A.N. 1730-32. As currently codified at 37 U.S.C. § 552 (1988 & Supp. V 1993) and 5 U.S.C. § 5561(2) (1988), the Missing Persons Act applies to members of the uniformed service on active duty or performing inactive duty training and generally to an employee in an executive agency or military department of the federal government who is a citizen or national of the United States or an alien admitted to the United States for permanent residence.

neutral country, captured by an enemy, or beleaguered or besieged by enemy forces.[131] It did not apply, however, to persons who were absent without authority.[132]

2. Pay and Allowances—The Missing Persons Act entitled service members and civilian employees in a missing status to receive, or to have credited to their accounts, the same pay and allowances to which they were entitled at the beginning of their absence or may have become entitled to thereafter.[133] Additionally, like earlier laws providing for payments to prisoners of war, a service member's expiration of a term of service during his absence did not terminate the right to pay and allowances.[134]

3. Allotments—The Missing Persons Act also addressed allotments for the support of dependents. Generally, the Service Secretary (then called the "Department Head") could "direct the continuance, suspension, or resumption of payments" of such allotment ~The Secretary could take such action when justified "in the interest of the Government, or of the missing person, or of a dependent of the missing person."[136]

As originally enacted, however, Congress intended payments of allotments to be temporary. The original Missing Persons Act allowed payments to continue for one year after the person first became missing, or until the Service Secretary officially declared the person dead, whichever came first.[137] One exception was that if a Military Service received an official report that the person was alive and in enemy hands, beleaguered or besieged by enemy forces, or interned in a neutral country, payments continued until the Service received evidence that the person was dead or returned to Service control.[138] A short ten months after enactment, however, Congress amended the Missing Persons Act to provide that allotments also

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131 Missing Persons Act, ***supra*** note 127, §§ **2,** 14 (current version at 37 U.S.C. 9 551(2) (1988) and *5* U.S.C. § 5561(5) (1988)).

132 *Id.* § **2** (current version at 37 U.S.C. § 552(c) (Supp. V 1993) and ***5*** U.S.C. § 5562(c) (1988)).

133 *Id.* (current version at 37 U.S.C. § 552(a) (1988) and *5* U.S.C. § 5562(a) (1988)).

134 *Id.* (current version at 37 U.S.C. § 552(b) (Supp. V 1993)).

135 *Id.* § **4** (current version at 37 U.S.C. § 553 (Supp. V 1993) and *5* U.S.C. § 5563 (1988) allows the Service Secretary to initiate, continue, discontinue, increase, decrease, suspend or resume payment of allotments from the pay and allowances of a missing person).

136 *Id.* (current version at 37 U.S.C. § 553 (1988 & Supp. V 1993) and ***5*** U.S.C. § 5563 (1988)). In addition, dependents could continue to receive an allotment, even if it expired while the service member was in a missing status. *Id.* § 3 (current version at 37 U.S.C. § 552 (1988 & Supp. V 1993)).

137 *Id.* § 3.

138 *Id.* §§ 3-4.

were to continue beyond the initial twelve-month period when the Secretary decided to continue a person in a missing or missing in action status.[139]

4. Determinations *of* Death—The Missing Persons Act provides two types of determinations of death: (1) an official report of death and (2) a finding of death. As originally enacted, the Missing Persons Act did not provide any particular method or standard on which to make a "finding of death," but left this matter entirely to the Secretary's discretion.[140] Congress quickly recognized, however, the need for an inquiry prior to making a finding of death. Therefore, the 1942 amendments to the Missing Persons Act changed the manner under which a Service Secretary could declare a missing person dead. The amendments required the Secretary to fully review a case of a person who was missing or missing in action when the twelve-month period from the date of commencement of the absence was about to expire.[141] Following this review, and after the expiration of twelve months from the beginning of the absence, the Secretary could direct that the person be continued in a status of missing or missing in action if the person could reasonably be presumed to be living. Otherwise, the Secretary could make a finding of death.[142] The amendment also clarified that the Service Secretaries must conduct additional inquiries "whenever warranted by information received or other circumstances."[143]

Congress again amended the Missing Persons Act in 1944.[144] Most importantly, the amendments addressed more fully the circumstances under which a Military Service could make an "official report of death" and a "finding of death."[145] First, the amendment authorized a Service Secretary to make an "official report of death" when he received information that established conclusively the death of a missing person.[146] According to the amendment, a

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139 Act of December 24, 1942, ch. 826, sec. 1, §§ 5-6, 56 Stat. 1092 [hereinafter Act of December 24, 1942] (current version at 37 U.S.C. § 553 (1988 & Supp. V 1993) and 5 U.S.C. § 5563 (1988)).

140 Missing Persons Act, ***supra*** note 127, § 5.

141 Act of December 24, 1942, ***supra*** note 139, sec. 1, § 5 (current version at 37 U.S.C. § 555 (1988 & Supp. V 1993) and 5 U.S.C. § 5565 (1988 & Supp. V 1993)).

142 *Id.* The amendment also provided that when the Secretary concerned made a finding of death, the finding must include the date on which death was presumed to have occurred for the purposes of terminating pay and allowances, settling accounts, and paying death gratuities. The date of death must be the day following the day of expiration of an absence of 12 months, or in cases where the missing status was continued, a day determined by the Service Secretary. *Id.*

143 *Id.*

144 Act of July 1, 1944, ch. 371, 58 Stat. 679.

145 *Id.* sec. 5, § 9 (current version at 37 U.S.C. §§ 555, 556(b) (1988 & Supp. V 1995) and 5 U.S.C. §§ 5565, 5566(b) (1988 & Supp V 1993)).

146 *Id.*

Secretary's determination on this matter was conclusive. A Secretary could make an official report of death under these circumstances even if he had previously taken action relating to death or other status of the person.[147]

The 1944 amendments also provided a standard of proof that a Service Secretary must meet before making a "finding of death" after the twelve-month review. The Secretary concerned could make a finding of death whenever he decided that "information received, or a lapse of time without information . . . [established], a reasonable presumption that any person in a missing or other status is no longer alive."[148]

5. Temporary Nature of the Original Missing Persons Act— Except for federal income tax purposes,[149] Congress originally enacted the Missing Persons Act to remain in effect from 8 September 1939 until twelve months after the termination of the war with Germany, Italy, and Japan.[150] By Joint Resolution, Congress designated the termination date of any state of war for purposes of the Missing Persons Act to be **25** July 1947.[151] However, in June of 1948, Congress deleted this provision from the Joint Resolution, and made the Missing Persons Act applicable to persons inducted into the armed forces under the Universal Military Training and Service Act of 1948.[152]

Reflecting the temporary nature of the Missing Persons Act, Congress continued to extend the Missing Persons Act in one-year

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147 *Id.*

148 *Id.* Congress also deleted the requirement for an "official report" from the enemy that a person was in a missing status. *Id.* sec. 2, § 2 (current version at 37 U.S.C. § 552(a) (1988) and 5 U.S.C.§ 5562(a) (1988)). Under the original act, entitlement to pay and allowances was dependent upon a person being "officially *reported* as missing, missing in action, interned in a neutral country, or captured by an enemy." Missing Persons Act, *supra* note 127,§ 2 (emphasisadded).

149 *See* Missing Persons Act, *supra* note 127, § 13 (providing that a person in a missing status is not liable to pay any federal income tax until the earliest of the fifteenth day of the third month following the month: (1) in which the person ceased to be a prisoner of war or detained by a foreign government; (2) in which the war with Germany, Italy, and Japan is terminated by presidential proclamation; or (3) in which an executor, administrator, or conservator of the estate of the person is appointed. The current version at 37 U.S.C. § 558 (1988) and **5** U.S.C. § 5568 (1988) provides that a federal income tax return of, or the payment of federal income tax by, a member in a missing status does not become due until the earlier of the fifteenth day of the third month following the month in which: (1) he ceased being in a missing status; or (2) an executor, administrator, or conservator of the estate of the taxpayer is appointed).

150 *Id.* § 15, *amended by* Act of December 24, 1942, *supra* note 139, sec. **1,** § 15 (providing that the act shall be effective until 12 months after the termination of the war with Germany, Italy, and Japan, "or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate").

151 Act of July 25, 1947, ch. 327, § **3,** 61 Stat. 449,451.

152 *Id.* ch. 625, § 4(e), 62 Stat. 604, 608.

increments from 1952 to 1957.[153] Finally, Congress eliminated the provision limiting the duration of the Missing Persons Act in 1957.[154] The legislative history reflects that Congress made the Missing Persons Act permanent in 1957 because of the size of American forces in many foreign countries at that time and the likelihood that "several military and civilian employees [would] continue to enter a missing status each year." Unless the Missing Persons Act was permanent, Congress felt that "the dependents of persons entering a missing status could experience inconvenience and hardship."[155]

6. Other Significant Amendments — Congress continued to amend the Missing Persons Act, in many instances broadening its scope to accommodate particular conflicts, such as those in Korea and Vietnam. For example, as a result of United States involvement in Korea, Congress amended the Missing Persons Act by substituting the phrase "hostile force" for "enemy," and by deleting the phrase ''interned in a neutral country" and substituting "interned in a foreign country."[156] Additionally, in the 1960s and early 1970s, Congress again amended the Missing Persons Act as a result of the then-on-going conflict in Vietnam. In 1964, for instance, Congress amended the Missing Persons Act to include a person "detained in a foreign country against his will."[157] Congress also (belatedly) amended the Missing Persons Act to specifically include members of the Air Force.[158]

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153 ***See*** Act of July 3, 1952, ch. 570, § 1(a)(7), 66 Stat. 330, 331, ***amended*** *by* Act of March 31, 1953, ch. 13, 67 Stat. 18 (continuing the provisions of the Missing Persons Act until July 1, 1953); ***repealed*** *by* Act of April 4, 1953, ch. 17, § 2, 67 Stat. 20, 21 (providing that the termination date of the Missing Persons Act was February 1, 1954); ***repealed*** *by* Act of January 30, 1954, ch. 3, 68 Stat. 7 (providing that the termination date was July 1, 1955); ***repealed*** *by* Act of June 30, 1955, ch. 254, 69 Stat. 238 (providing that the termination date was July 1, 1956); ***repealed*** *by* Act of July 20, 1956, ch. 658, 70 Stat. 595 (providing that the termination date was July 1, 1957); ***repealed*** *by* Act of August 7, 1957, PUB. L. NO. 85-121, 71 Stat. 341 (providing that the termination date was April 1, 1958).

154 Act of August 29, 1957, PUB. L. NO. 85-217, sec. (e), § 15, 71 Stat. 491, 493.

155 S. **REP.** NO. 970, 85th Cong., 1st Sess. (1957), ***reprinted in*** 1957 U.S.C.C.A.N. 1730, 1731.

156 ***See*** Act of July 3, 1952, ch. 570, § 1(a)(7), 66 Stat. 330, 331 (current version at 37 U.S.C. § 551(2) (1988) and 5 U.S.C. § 5561(5) (1988) (extending the Missing Persons Act until ***six*** months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proclamation No. 2914, 3 C.F.R. 71 (Supp. 1950)) and, during that extension, providing for amendments as discussed in the text). ***See also*** Act of April 4, 1953, ch. 17, § 2, 67 Stat. 20, 21 (amending the Missing Persons Act by extending the act until February 1, 1954, and permanently amending the act as discussed in the text).

157 Act of August 14, 1964, PUB. L. No. 88-428, sec. 3, § 2, 78 Stat. 437 (current version at 37 U.S.C. § 551(2) (1988) and 5 U.S.C. § 5561(5) (1988)).

158 ***Id.*** secs. 2 and 7 of §§ 1(b), 10 (current version at 37 U.S.C. § 551(2) (1988)). During this time, Congress also enacted several amendments to the Missing Persons Act on entitlement of dependents to travel and transportation allowances. In 1968, for example, Congress amended the act by adding a provision authorizing the tempor-

Prior to 1966, the Missing Persons Act was codified in Title 50 of the United States Code Appendix (War and National Defense).[159] In 1966, Congress revised the laws relating to civilian employees of the federal government and re-codified them at Title 5, United States Code. As part of that re-codification, Congress re-codified the portions of the Missing Persons Act relating to civilian officers and

ary storage of household and personal effects for a member who is officially reported as absent for a period of more than 20 days or in a missing status. Act of January 2. 1968, PUB. L. NO. 90-236, 81 Stat. 764 (codified at 37 U.S.C. § 554(b) (1988)). In an Air Force recommendation, dated August 31, 1967, then-Under Secretary of the Air Force Norman Paul explained:

> Family life without the member is an extremely difficult one, particularly following a notice that the member is in a missing status. The dependents of members in such circumstances deserve the most compassionate and humane consideration that our Government can bestow. They ought to be able to postpone making a decision on moving until they are under less emotional strain and have a firm idea as to final disposition of effects. Action to make this possible is no more than moral responsibility.

Statement attached to S. REP. NO. 932, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2653, 2654-55.

Congress also authorized movements of mobile homes and trailers and additional movements when justified. Act of October 9, 1972, PUB. L. NO. 92-477, § 1. 86 Stat. 793 (codified at 37 U.S.C. § 554(a) (1988 & Supp. V 1993)). In considering this legislation, the Senate Committee on Armed Services noted that as of May 6, 1972, there were a total of 1077 military families of service members in a missing status. S. REP. No. 1234, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N.3552, 3553.

Congress further amended the act to allow payments to survivors of dependency and indemnity compensation based on the highest pay grade held by the missing service member, even if later determined that the member died prior to the date of promotion to that grade. Act of November 24, 1971, PUB. L. NO. 92-169, $ 1, 85 Stat. 489 (codified at 37 U.S.C. § 552(a) (1988) and 38 U.S.C. § 1302 (1988)).Congress inadvertently repealed the amendment in Act of October 12, 1972, PUB. L. NO. 92-482, 86 Stat. 796; and re-enacted the amendment in Act of April 27, 1973, PUB. L. No. 93-26, § 1, 87 Stat. 26. In re-enacting the legislation in 1973, Congress noted that over 65 missing service members had been promoted since October 12, 1972. The Senate Committee on Armed Services anticipated that a total of 149 such promotions would be made before June 1, 1973. S. REP. NO. 104, 93d Cong., 2d Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 1293, 1294.

Finally, Congress amended the act to permit continued payment of incentive pay for hazardous duty to service members during a period of hospitalization and rehabilitation after they returned from a missing status. Act of October 12, 1972, PUB. L. No. 92-482, 86 Stat. 796 (codified at 37 U.S.C. § 552(a)(2) (1988)). In considering this legislation, the Senate Committee on Armed Services noted that, as of 6 May 1972, a total of 1428 missing service members continued to receive incentive pay for hazardous duty. As of that date, the average period these service members had been missing or imprisoned in Vietnam was over five years. More than 450 of them had been in a missing status longer than any American service member in history. Therefore, because of the length and circumstances of their confinement, Congress anticipated that, if returned, these service members would require periods of hospitalization and rehabilitation before they were again able to engage in hazardous duties. Congress did not believe that family income should be reduced by cutting off incentive pay for a one-year period because the period of hospitalization and rehabilitation would be particularly trying on service members and their families. S. REP. No. 1235, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3565,3566.

[159] 50 U.S.C. app. §§ 1001-1015 (1964), *repealed by* Act of September 6, 1966, PUB. L. No. 89-554, § 5(b), 80 Stat. 378, 625.

employees in Title 5.[160] At the same time, Congress re-codified the provisions of the Missing Persons Act relating to service members in Title **37,** United States Code (Pay and Allowances of the Uniformed Services).[161] Thus, congressional placement of the Missing Persons Act in Title **37** indicates that it continued to view it as a law concerned with the pay and allowances of missing service members.

The only significant change to the Missing Persons Act since the Vietnam Conflict resulted from the Iranian hostage crisis in 1979 and 1980 and from other incidents of hostage-taking in the Middle East.[162] In 1986, Congress added a new provision to the Missing Persons Act to provide certain benefits to members of the uniform services held as captives.[163] This provision established a new missing status, that of a "captive status,'' and provided special payments to service members, and others, who are in that status.[164]

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160 *See* 5 U.S.C. §§ 5561-69 (1988 & Supp. V 1993).

161 *See* 37 **U.S.C.** §§ 551-59 (1988 & Supp. V 1993).

162 After American citizens were taken hostage in Iran, Congress passed the Hostage Relief Act of 1980, PUB. L. No. 96-449, 94 Stat. 1967, *reprinted in* 5 U.S.C. § 5561 (Supp. 1995). This act defines an "American Hostage" to include both individuals in the civil service and the uniformed services of the United States. Among other benefits, the act provides allotments to special savings funds, payment for certain education and training of a spouse or child, and special rules regarding federal tax liability. Congress later extended these provisions to include American hostages in Iraq, Kuwait, and Lebanon. Act of November **5,** 1990, PUB. L. NO. 101-513, § 559C, 104 Stat. 1979, 2064; Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, PUB. L. NO. 102-138, § 302(A), 105 Stat. 707, 708 (1991) (effective as of the date of enactment of Act of November 5, 1990, *supra);* and Act of October 24, 1992, PUB. L. NO. 102-499, § 5(a), 106 Stat. 3264, 3266 (effective as of the date of enactment of Act of November 5, 1990, *supra), reprinted in* 5 U.S.C. § 5561 (1988 Supp. V 1993).

163 Omnibus Diplomatic Security and Antiterrorism Act of 1986, PUB. L. NO. 99-399, §§ 803(a), 806(a)(1), 100 Stat. 853, 879, 884, *amended by* Defense Technical Corrections Act of 1987, PUB. L. No. 100-26, § 8(e)(11), 101 Stat. 273, 286 (codified at 37 U.S.C. § 559 (1988 & Supp. V 1993) and 5 U.S.C. § 5569 (1988)).

164 *See* 37 U.S.C. § 559 (1988 & Supp. 1995); 5 U.S.C. § 5569 (Supp. 1995). The President may determine that a service member is in a captive status if the captivity arose because of a hostile action and as a result of membership in the uniform services. The law does not, however, include a period of captivity as a prisoner of war if Congress provides monetary payment in recognition of that captivity. 37 U.S.C. § 559(a)(1) (Supp. V 1993). If the individual is in a captive status, the President must make a cash payment to the service member or civilian prior to the end of the one-year period beginning on the date on which that status terminates. 37 U.S.C. § 559(c)(1) (Supp. V 1993) and 5 U.S.C. § 5569(d)(1) (1988). The amount of the cash payment to a service member or civilian who becomes a captive is determined under 5 U.S.C. § 5569(d)(2) (1988), which provides:

> [Tlhe amount of the payment under this subsection with respect to an individual held as a captive shall be not less than one-half of the amount of the worldwide average per diem rate under section 5702 of this title [title **5,** US. Code] which was in effect for each day that individual was so held.

The President may defer payment if the former captive is charged with certain captivity-related offenses during that one-year period. If convicted of the offense, the President may deny payments under the law. In the case of service members, these

C. Litigating Secretarial Determinations Under the Missing *Persons* Act

Federal court cases construing the Missing Persons Act began to appear in the early 1950s. Generally, plaintiffs were service members and federal government employees complaining of a Service Secretary's decision in one of three areas: (1) a person's status as it affected rights to pay and allowances, (2) the types of allowances payable under the Missing Persons Act, and (3) allotments to family members.

1. Determinations *of* Status — The first court decisions on the Missing Persons Act concerned an individual's entitlement to pay and allowances based on a Service Secretary's determination of status. Because the Missing Persons Act provides that such decisions are "conclusive,"[165] the courts have consistently held that a Service Secretary's decision concerning a person's entitlement to pay and allowances is not subject to judicial review, except on a showing that the decision is arbitrary or capricious and not supported by substantial evidence.

"captivity-related offenses" include offenses referred to under the UCMJ, chapter 47, Title 10, United States Code, that are punishable by dishonorable discharge, dismissal, or confinement for one year or more. 37 U.S.C. § 559(c)(3)(A)(ii)(II) (1988). Additionally, as applied to both service members and civilians, captivity-related offenses include those offenses referred to in 5 U.S.C. § 8312(b)-(c) (1988 & Supp. V 1993), such as harboring or concealing persons, gathering, transmitting, or losing defense information, gathering or delivering defense information to aid foreign government, disclosing classified information, espionage and censorship, sabotage, treason, misprision of treason, rebellion or insurrection, seditious conspiracy, advocating overthrow of government, recruiting for service against United States, enlistment to serve against the United States, tampering with or receipt or communication of restricted data, and certain perjuries. ***See*** 37 U.S.C. § 559(c)(3)(A)(ii)(I) (1988); 5 U.S.C. § 5569(d)(3)(B) (1988).

Unlike Secretarial determinations under other provisions of the Missing Persons Act, the new section specifically provides that Presidential decisions regarding captive status and deferral or denial of payments are final and not subject to judicial review. 37 U.S.C. § 559(d) (1988); 5 U.S.C. § 5569(i) (1988).

[165] Missing Persons Act, *supra* note 127, § 9, *amended by* Act of July 1, 1944, *supra* note 144, sec. 5, § 9 (current version at 37 U.S.C. § 556(a) (1988) and 5 U.S.C. § 5565(a) (1988)).

[166] 93 F. Supp. 607 (Ct. Cl. 1950), ***cert. denied,*** 342 U.S. 814 (1951). Merino was born in the Philippines and was a naturalized citizen of the United States. On July 26, 1941, President Roosevelt called the Philippine Army into the service of the United States. The United States ordered Moreno to extended active duty as a second lieutenant in the Philippine Scouts on 8 February 1942. Two months later, the Japanese Army captured Moreno. Thereafter, the United States formally surrendered all American and Filipino Army troops in the Philippines to Japan in June 1942. The Japanese held Moreno as a prisoner of war until late June 1942, when they released him on parole and allowed him to return to his home. It was not until January 28, 1945 that the United States Army, having recaptured the Philippines, resumed military control of its former personnel, including Moreno. *Id.*

For example, in the 1950 case of Moreno *v.* United *States,*[166] the Court of Claims held conclusive an Army decision that First Lieutenant Moreno was not in a missing status during a certain period and therefore not entitled to pay and allowances. In doing so, the Court of Claims noted that the Missing Persons Act provides that Secretarial determinations "shall be conclusive as to . . . any . . . status dealt with by this Act" and that Secretarial decisions "of entitlement of any person, under provisions of this Act, to pay and allowances . . . shall be conclusive."[167] The Court of Claims noted, however, that even assuming Congress intended such determinations to be subject to an arbitrary and capricious standard, it could not find that the Army acted arbitrarily in this case.[168] Thus, the Court of Claims left open the possibility that it would overturn a Secretarial decision that was arbitrary and capricious.

The Court of Claims followed its holding in Moreno in the 1955 cases of Ferrer *u.* United *States*[169] and Logronio *v.* United *States,*[170]

In the Act of 25 July 1947, ch. 329, 61 Stat. 455, Congress amended the Appropriation Act of February 18, 1946, ch. 30, 60 Stat. 6, to provide benefits to the Army of the Philippines under the Missing Persons Act. Under the Missing Persons Act, the proper authority determined that Moreno was not in a casualty status during the period of his parole by the Japanese. The Army reasoned that one who is paroled and allowed to go to his home is not in the status of a person "captured by an enemy, beleaguered or besieged," as required by the act. ***Moreno,*** 93 F. Supp. at 607.

167 Missing Persons Act, ***supra*** note 127, § 9; ***amended*** *by* Act of 1 July 1944, ***supra*** note 144, sec. **5,** § 9 (current version at 37 U.S.C. § 556 (1988) and 5 U.S.C. § 5566 (1988)).

168 Congress amended the Missing Persons Act in 1957 to cover those Philippine Scouts who, like Moreno, were captured by the Japanese and then paroled and allowed to return to their homes. The amendment allowed these individuals to receive their pay and allowances for the period of their parole. The amendment did not cover Philippine Scouts, however, who voluntarily participated with or for the Japanese in activities of a military nature hostile to the United States. Act of August 29, 1957, PUB. L. NO. 85-217, sec. (b), § **2,** 71 Stat. 491. Congress noted that the amendment was necessary to pay these individuals because the War Department had a policy only to pay Philippine Scouts if they could show restraint, deprivation, or hardship greater than that which was suffered by the other people of the islands. Under this standard, the War Department determined that Philippine Scouts who had joined a guerrilla unit or engaged in other anti-Japanese activities were in a missing status and entitled to full pay. The War Department, however, decided that those who had merely gone home to their civilian pursuits could not be paid. S. **REP.** NO. 970, 85th Cong., 1st Sess. (1957), ***reprinted*** in 1957 U.S.C.C.A.N. 1730, 1733.

169 140 F. Supp. 954 (Ct. Cl. 1955). Ferrer also was a member of the Philippine Army who, like Moreno, was called into the service of the United States Armed Forces during World War II. On 17 April 1942, Ferrer left his unit and was absent until 28 December 1942, during which time he alleged that he was hiding in the hills to avoid capture by the enemy. On 28 December 1942, Ferrer became a member of the Cebu Area Command, a guerrilla organization. The proper authority determined that Ferrer was not in a missing status from the time he left his unit until he joined the guerrilla organization.

170 133 F. Supp. 395 (Ct. Cl. 1955). Logronio was another member of the Philippine Army in the service of the United States during World War II who claimed that he was entitled to pay and allowances during a period in which the Army had declared him to be in a "no casualty" status and not entitled to benefits under the act.

and the 1961 case of *Alpuerto v. United States*.[171] Citing *Moreno,* the Court of Claims found in all three cases that the Army's decision that a soldier was not in a missing status during a certain period was final and conclusive. In the 1961 case of *Espartero v. United States,*[172] however, the Court of Claims made clear that it would be willing to overturn a Secretarial decision on status under the Missing Persons Act, finding that the Missing Persons Act "prevents this court from reviewing a determination under this Act *unless it is shown that such determination was arbitrary or capricious.*"[173]

The first Supreme Court decision construing the Missing Persons Act was the 1961 case of *Bell v. United States*.[174] The petitioners in *Bell* were enlisted men in the United States Army who were captured in 1950 and 1951 during the Korean Conflict. In its opinion, the Supreme Court noted that, while in the prison camps, the petitioners behaved with "utter disloyalty to their comrades and to their country."[175] Moreover, after the Korean Armistice in 1953, the plaintiffs refused repatriation and went to Communist China. The Army formally discharged them in 1954. After they returned to the United States in 1955, the Army denied their claims to recover pay and allowances that accrued before their discharge. The Court of Claims likewise denied their subsequent petitions, finding that "neither the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs."[176]

Curiously, the petitioners in *Bell* did not rely on the Missing Persons Act in alleging that they were entitled to pay and allowances during the time in question. Rather, they claimed entitlement under the very same 1814 statute that Lieutenant Jones had relied on when he was taken prisoner by the Confederate Army during the Civil War.[177] Generally, that law provided that a soldier who is captured by the enemy is entitled to receive his pay, subsistence, and allowances.[178]

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171 152 Ct. Cl. 270 (1961). The Army determined under the Missing Persons Act that Alpuerto, also a member of the Philippine Army, was in a missing status during the period in question, therefore entitling him to the pay and allowances of a private first class. Alpuerto filed suit, however, claiming that he should not have been paid as a private first class, because the Philippine Army had promoted him several times during the period in question.

172 152 Ct. Cl. 789 (1961).

173 *Id.* at 792 (emphasis added).

174 366 U.S. 393 (1961).

175 *Id.* at 394.

176 181 F. Supp 668, 674 (Ct. Cl. 1960).

177 *See Lieutenant Jones' Case,* 4 Ct. Cl. 197 (1868), discussed *supra* notes 124, 125 and accompanying text.

178 Act of 30 March 1814, *supra* note 121 (codified at 37 U.S.C. § 242 (1958) when the Supreme Court considered *Bell).*

The government first argued that the Missing Persons Act was later in time and should be controlling. The Supreme Court refused to find, however, that the Missing Persons Act operated to repeal the **1814** statute on which petitioners relied. The Court found that the legislative history of the Missing Persons Act disclosed that, at the time it was considered, Congress was fully aware of the **1814** statute and did not repeal it.[179] The government next argued that the petitioners were not covered by the Missing Persons Act because their behavior as prisoners of war rendered them no longer in the "active service in the Army . . . of the United States" as required by the Missing Persons Act.[180] The Court also rejected this argument, finding that "active service" referred to a person's status at the time he became missing. The Court further noted that the Army had never made an administrative determination that the petitioners were absent without leave during the time in question.[181] Therefore, the Supreme Court held that under either statute the petitioners were entitled to the pay and allowances that accrued during their deten-

[179] *Bell,* 366 U.S. at 409, n.21. Additionally, the Court noted that Congress had twice recodified the 1814 statute since the Missing Persons Act was first enacted in 1942, once in 1952 and again in 1958. Therefore, the Missing Persons Act was not clearly "later in time" and, thus, controlling, as argued by the government. Congress repealed the 1814 statute one year after the Supreme Court decision in ***Bell*** in Act of 7 September 1962, *supra* note 126.

[180] *Bell,* 366 U.S. at 408 (quoting the Missing Persons Act as then codified at 50 U.S.C. app. § 1002(a) (1958)).

[181] *Id.* at 412-13. The Court noted that the 1954 record of hearings before the House Committee on Armed Services on a bill to extend the Missing Persons Act indicated that some thought was given to the possibility of an administrative determination that petitioners were absent from their post of duty.

> Mr. Bates. General, what is the pay status of prisoners who have refused repatriation?
>
> General Powell. Those prisoners, sir, are carried in pay status. In negotiating the armistice we agreed that until this matter was settled they would be carried as prisoners of war.
>
> Mr. Kilday. When does that stop?
>
> Mr. Bates. Does that stop next week?
>
> General Powell. The method of stopping the pay and allowances, allotments and status of military personnel of those 21 prisoners is a matter to be decided by the Secretary of Defense for all services involved. He has announced no decision.
>
> Mr. Bates. Aren't they absent without leave?
>
> General Powell. No, sir.
>
> Mr. Bates. What is it?
>
> General Powell. In the armistice agreement, the United States agreed to carry them as prisoners of war until the matter was settled.
>
> Mr. Bates. I thought there was also an understanding that they would be considered a. w. o. l. as of a certain date?
>
> General Powell. That is a matter still to be decided by the Secretary of Defense.
>
> Mr. Bates. Or deserters, you know.
>
> General Powell. The Secretary of Defense is deciding for all services.

tion as prisoners of war.[182]

2. Determinations *on* Allowances — The Court of Claims also has considered what allowances are covered under the Missing Persons Act. The Court of Claims has not been consistent, however, on the standard used to review Secretarial decisions on allowances payable under the Missing Persons Act. At least two early decisions held that the question is one of law, fully reviewable by the courts. A later Court of Claims opinion held, however, that a Secretarial determination on payable allowances is conclusive and not reviewable by the courts, unless arbitrary and capricious.

In 1951, the Court of Claims considered two such cases. In Dilks *v.* United *States,*[183] the Court of Claims noted that the Missing Persons Act entitled a person in a missing status to the same pay

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> Mr. Kilday. I would like it understood that they are going to be cut off as soon as you can.
>
> General Powell. Sir, the Secretary of Defense must make a decision, including psychological factors, individual rights, the law involved, and national policy.
>
> Mr. Vinson. That is right.
>
> General Powell. He has not as yet announced such a decision to us.
>
> Mr. Cunningham. Should the pay and allotments, benefits to the members of the family, ever be cut off?
>
> The Chairman. Sure.
>
> Mr. Van Zandt. Oh, yes.
>
> Mr. Cunningham. Why so? They are not to blame for this.
>
> Mr. Bishop. No, they are not.
>
> Mr. Vinson. Well, if a man is absent without leave—
>
> Mr. Cunningham. **A** man has children or wife and he is over there in Korea and decided to stay with the Communists. Why should the children be punished?
>
> The Chairman. Wait, one at a time. The reporter can't get it.
>
> Mr. Cunningham. I think it is a good question. The pay for the individual: he should never have that, and his citizenship. But here is a woman from Minnesota, goes over there and pleads with her son and went as far as Tokyo. Now that mother needs an allotment as that boy's dependent. Why should she be punished because the boy stayed over there? I think there are a lot of things to be considered; not just emotion.

Hearings before House Committee** on **Armed Services** on **H.R. 7209, 83d Cong., 2d Sess. 3071-72 (1954), ***reprinted** in **Bell,*** 366 U.S. at 413 n.28.

182 ***Bell,*** 366 U.S. at 416. The Court further noted that the law relating to the right to pay of members of the Navy taken prisoner did appear to require a standard of conduct after capture. That statute, then codified at 37 U.S.C. § 244 (1958), required that, to receive pay and allowances, seamen must appear "to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy." On the other hand, the Army statute, then codified at 37 U.S.C. § 242 (1958), did not contain such a standard. (Both the Army and Navy statutes were repealed in 1962; ***see supra*** note 126 and accompanying text.)

183 97 F. Supp. 702 (Ct. Cl. 1951).

and allowances to which he was entitled at the beginning of such absence.[184] Consequently, the Court of Claims held, as a matter of law, that an individual is entitled to all allowances that he is receiving under competent, unrevoked, and existing orders at the time of captivity, absent proof of a specific congressional intent to exclude them.[185] In ***Dilks,*** the government had argued that under the holding in ***Moreno v. United States,***[186] the Army's decisions on what allowances are payable under the Missing Persons Act are conclusive and may not be overturned, absent a finding that the decision was arbitrary and capricious. The Court of Claims disagreed, finding that it was not bound by the decision in ***Moreno,*** and that the only issue was one of law as to what Congress intended when it used the expression "the same pay and allowances."[187] Citing its holding in ***Dilks,*** the Court *of* Claims in ***Hevenor v. United States***[188] again held

184 Missing Persons Act, ***supra*** note 127, § 2 (current version at 37 U.S.C. § 552(a) (1988) and 5 U.S.C. § 5562(a) (1988)).

185 ***Dilks,*** 97 F. Supp. at 706. The court found that the Act's language, taken by itself, included any allowance of which a missing person was validly in receipt. Therefore, the government would have to show proof that Congress specifically intended to exclude any one type of allowance. The government cited to certain legislative history showing that Congress was advised of, and agreed to, the policy of crediting such allowances as flight pay, submarine pay, parachute pay, subsistence, and rental or quarters allowances, but not temporary per diem or travel. The government was unable to show, however, that Congress specifically intended to exclude from payable allowances under the act subsistence in lieu of rations and quarters. Therefore, the court held Dilks was entitled to this allowance.

186 93 F. Supp. 607 (Ct. Cl. 1950).

187 ***Dilks,*** 97 F. Supp. at 706 (quoting the Missing Persons Act, ***supra*** note 127, § 2 (current version at 37 U.S.C. § 552(a) (1988) and 5 U.S.C. § 5562(a) (1988)). The court noted that, unlike the case of ***Moreno v. United States,*** 93 F. Supp. 607 (Ct. Cl. 1950), where the court found conclusive an Army determination as to missing status, there was no issue as to Dilks' status—the Army had decided that he was in a missing status. The only issue was which allowances Dilks was entitled to receive because of his missing status. Reviewing the legislative history of the Act's provision that Secretarial determinations are conclusive, the court found that Congress enacted the provision to preclude the General Accounting Office from later disallowing a service settlement because of incomplete records, and not to preclude judicial review. ***Dilks,*** 97 F. Supp. at 705-06.

188 101 F. Supp. 465 (Ct. Cl. 1951). Hevenor was a civilian employee of the federal government who was captured and imprisoned by the Japanese while on official business at Wake Island on 23 December 1941. He was released from a prisoner of war camp in Japan in September 1945. Hevenor had traveled to Wake Island under travel orders authorizing a per diem of $6 in lieu of subsistence. After his return in 1945, he filed a claim that included per diem for the entire period of his captivity. The Director of the Bureau of the Budget determined that Hevenor was entitled to the per diem, as stated in travel orders, for the entire period of his captivity. The Comptroller General of the United Stated disagreed. The Comptroller found that temporary per diem allowance while in a travel status was not an "allowance" that was contemplated by the phrase "pay and allowances" as used in the Missing Persons Act. Hevenor v. United States, 27 Comp. Gen. 205 (1947).

Hevenor then petitioned the Court of Claims, arguing that: (1) per diem allowances in lieu of subsistence was clearly within the terms of "same pay and allowances" under the Act and (2) that, if there was any doubt, the Act precluded review of the Director, Bureau of the Budget decision that Hevenor was entitled to the allowance because the Director's determination was conclusive.

that a Service's decision as to what constitutes allowances for purposes of the Missing Persons Act is a question of law, not precluded from judicial review by the Missing Persons Act.[189]

Ten years later, in 1961, the Court of Claims decided the case of Espartero *v.* United States.[190] The proper authority decided that Espartero was in a missing status during the time in question, entitling him to pay, but denied his claim for certain allowances. Without citing ***Dilks*** or Heuenor, the Court of Claims held that "[c]learly plaintiff cannot recover under the Missing Persons Act" because it provides that the Army's determination that Espartero was not entitled to the allowances was conclusive.[191]

By implication, then, Espartero overruled *Dilks* and Heuenor; the same standard of review is to be applied to Service decisions on allowances payable under the Missing Persons Act as applied to decisions on status.

3. Determinations on Allotments—The final area of litigation on payments authorized by the Missing Persons Act is a Service Secretary's decision on payments of allotments to dependents.[192] The Missing Persons Act requires the Service Secretary to make decisions on allotments of pay and allowances in the interests of "the member, his dependents, or the United States."[193] Similar to other Secretarial decisions under the Missing Persons Act, courts have held that Secretarial decisions on payments of allotments to family members are not subject to judicial review, unless arbitrary and capricious.

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189 *Hevenor,* 101 F. Supp. at 467. The Court of Claims held that the Act did not entitle Hevenor to per diem for travel expenses because the legislative history of the act indicated that Congress intended to exclude such allowances from coverage under the act (quoting *Hearings of the House Committee on Naval Affairs on H.R. **4405,*** 78th Cong., 2d Sess. 2343 (1944) which states, in pertinent part, that "[i]t has been administratively determined that pay and allowances to be credited during an absence include all continuing pay and allowances to which entitled at the beginning of an absence but not temporary allowances such as per diem for travel expenses"). *Hevenor,* 101 F. Supp. at 466.

190 152 Ct. Cl. 789 (1961).

191 *Id.* at 791. This is the very same argument made by the government, and rejected by the Court of Claims, in *United States v. Dilks,* 97 F. Supp. 702 (Ct. Cl. 1951). In analyzing this issue, the court cited to its earlier decisions, beginning with *Moreno v. United States,* 93 F. Supp. 607 (Ct. Cl. 1950), that service decisions on status are conclusive and not reviewable, unless arbitrary and capricious. *Espartero,* 152 Ct. Cl. at 791-92.

192 Missing Persons Act, *supra* note 127, § 1(c), *amended by* Act of 1 July 1944, ***supra*** note 144, sec. 1, § 1(c) (current version at 37 U.S.C. § 551(1) (1988) and 5 U.S.C. § 5561(3) (1988)), defined "dependents" as a lawful wife, an unmarried child under 21 years of age, a dependent mother or father, an unmarried dependent stepchild or adopted child under 21 years of age, a dependent designated in official records, or an individual determined to be a dependent by the Service Secretary.

193 Missing Persons Act, *supra* note 127, § **4,** *amended by* Act of 1 July 1944, *supra* note 144, sec. **4,** § 4 (current version at 37 U.S.C. § 553(e) (Supp. V 1993) and 5 U.S.C. § 5563(e) (1988)).

For example, in 1979, the Court of Claims first considered the case of *Cherry v.* United Stutes.194 Colonel Fred Cherry was a prisoner of war in North Vietnam from October 1965 until February 1973.[195] During his captivity, the Air Force allotted nearly all of his pay and allowances, some $147,000, to his spouse for her support and the support their four children. After his return, Colonel Cherry divorced his wife on the grounds of adultery; she had been living with another man and had a child by him while Colonel Cherry was a prisoner of war.[196]

Colonel Cherry sued the Air Force to recover his pay and allowances, asserting two theories of recovery: (1)the Missing Persons Act was unconstitutional because it allowed confiscation of his property without due process of law or procedural safeguards, and **(2)** some payments to his former wife were illegal because the Air Force arbitrarily and capriciously failed to follow adequate safeguards to ensure that his interests, as well as those of his dependents, were being protected. In its original opinion, the Court of Claims first found the Missing Persons Act to be a constitutional exercise of congressional power "to make Rules for the Government and Regulation of the land and naval Forces."[197] The Court of Claims next observed that the Missing Persons Act gave the Air Force broad discretion in providing for family members, but that discretion was not absolute. The Secretary must consider the interests of "the member, his dependents, or the United States" when making decisions on allotments.[198]

Given this mandate, the Court of Claims found that the Service acts as a trustee for the service member. As trustee of Colonel Cherry's account, the Air Force had a duty to ensure that it equally weighed the interests of all beneficiaries. The Court of Claims found that at some point the Air Force should have investigated the manner in which Mrs. Cherry was expending funds and Colonel Cherry was entitled to funds disbursed after that point.[199] The Court of

194 594 F.2d 795 (Ct. Cl. 1979), *sub opinion,* 640 F.2d 1184 (Ct. Cl. 1988), *aff'd in part, and remanded,* 697 F.2d 1043 (Fed. Cir. 1983).

195 In 1965, Major Cherry's F-105D aircraft was shot down in Northern Vietnam. His wingman observed him on the ground and established and maintained beeper contact throughout the remaining daylight hours, but could not reestablish beeper contact the next morning. Colonel Cherry's subsequent captivity was marked by violent beatings by the North Vietnamese. He resisted his captors, refusing to compromise his beliefs and training until his release seven and one-half years later. SENATE SELECT COMMITTEE ON POW/MIA AFFAIRS, *supra* note 15, at 474.

196 *Cherry,* 594 F.2d at 797.

197 *See id.* (quoting U.S. CONST. art. I, § 8, cl. 14).

198 *See id.* at 798 (quoting 37 U.S.C. § 553(e)).

199 *Id.* at *800.* In Mrs. Cherry's case, the Air Force routinely, and without exception, granted requests for emergency funds, including: vacations, large amounts of cash allegedly stolen, and, in 1968, for surgery in a private hospital, despite the fact

Claims therefore remanded the case to the trial division to decide this issue.[200]

The Air Force then filed a motion for relief from judgment, arguing that the Missing Persons Act did not expressly impose a trust duty on the Air Force to administer the accounts of missing persons and that none may be implied.[201] In deciding this issue, the Court of Claims did not adhere to its earlier characterization as one of a trustee, finding it unnecessary for the Secretary to assume such a role to exercise the statutory duties in a manner that is constitutional. All that the law requires, according to the Court of Claims, is that the Secretary exercise the statutorily granted discretion fairly, without abusing it.[202] In Colonel Cherry's case, the Court of Claims found that the Air Force arbitrarily and capriciously settled on a policy of satisfying the demands of Mrs. Cherry without considering Colonel Cherry's interests. Vacating its prior decision, the Court of Claims again remanded the case to the trial division.[203]

In *Pitchford v. United States,*[204] the Court of Claims ruled that "[i]t requires an extraordinary case, such as that in *Cherry,* for [the court] to conclude that the Secretary abused his discretion."[205] Again, the court noted that the Missing Persons Act gives the Secretary wide discretion to decide whether a particular payment is

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that she was entitled to free medical care (the record indicated that the surgery was for the delivery of an illegitimate child). Additionally, the court found that the record indicated that Colonel Cherry's sister had complained to the Air Force that a man was living with Mrs. Cherry and that she had borne him a child. Further, it was clear by late 1971 that Mrs. Cherry was avoiding inquiries by the Air Force. *Id.*

200 *Id.* at 801.

201 Cherry v. United States, 640 F.2d 1184 (1988).

202 *Id.* at 1188.

203 *Id.* at 1190. After a trial division decision, adopted by the Court of Claims, Colonel Cherry appealed to the Federal Circuit in Cherry v. United States, 697 F.2d 1043 (Fed. Cir. 1983). The Federal Circuit agreed with the Court of Claims in all respects except the dates on which the Air Force should have investigated emergency requests and reduced the allotment. The court found that the appropriate Air Force regulation permitted the allotment of 100% of a missing member's pay and that, in view of Colonel Cherry's four minor children, the 100% allotment was reasonable. The court then found that in assigning a date on which the Air Force should have known that Colonel Cherry's interests were so compromised that a reduction was warranted, the Claims Court's Trial Division should be guided by two policies: (1) the Air Force's proper concern is with the missing person's pecuniary interest and (2) the Air Force should have a decent respect for the spouse's privacy and should presume good behavior. Id. at 1049.

The court then held that the receipt by the Air Force of the letter from Mrs. Cherry requesting reimbursement for "stomach surgery" is the occurrence from which the Air Force knew or should have known that Colonel Cherry's pecuniary interests were seriously compromised and should have reduced the allotment. The court noted that some payments should have continued, however, because Mrs. Cherry was feeding and clothing the four Cherry children. *Id.* at 1051.

204 666 F.2d 533 (Ct. Cl. 1981).

205 *Id.* at 535.

in the interest of "the member, his dependents, or the United States."[206] The Court of Claims found that it was not its function to "second-guess" a Secretary's judgment on whether a particular payment was appropriate; neither was it a court's function to substitute its judgment for that of the Secretary's on this issue. Therefore, the Court of Claims held that a Secretary's decision is subject to only the most limited review under the strict abuse of discretion standard.[207]

In summary, the federal courts have consistently construed the Missing Persons Act as providing the Service Secretaries wide discretion in making determinations under its provisions. Unless found arbitrary and capricious, federal courts have upheld Secretarial decisions under the Missing Persons Act on the status of an individual, payable allowances, and allotments to family members. Until the 1960s, decisions by the Service Secretaries under the Missing Persons Act were infrequently litigated and were not the subject of widespread public debate—then came Vietnam.

IV. The Legacy of Vietnam

> *MAUREEN DUNN: Mr. McNamara, you don't know who I am. But you certainly played a role in a situation that created the rest of my adult life. My name is Maureen Dunn. And I don't know if you remember the incident—February 14, 1968, the China Incident. You, President Johnson, Vice President Humphrey, Clark Clifford, Chairman of the Joint Chiefs of Staff General Wheeler . . . [and] Secretary of State Rusk . . . met for thirty minutes about "the China Incident." Do you remember that?*
>
> *ROBERT McNAMARA: No, I'm sorry.*
>
> *DUNN: A pilot was shot down over Hainan Island. Do you remember that incident?*

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206 Id. (quoting 37 U.S.C. § 553(e)).

207 *Id.* In Pitchford, the Court of Claims found that, unlike Mrs. Cherry's requests, the Air Force carefully considered Mrs. Pitchford's requests for funds before making disbursements. Furthermore, there was no indication that Mrs. Pitchford was unfaithful. At oral argument, plaintiff's attorney stated that the plaintiff's only complaint against his former wife during his captivity was that she had been "extravagant." *Id.* ***See*** *also* Luna v. United States, 810 F.2d 1105 (Fed. Cir. 1987) (finding that the Air Force's decision to grant Mrs. Luna's requests for money was not arbitrary and capricious. Contrasting the facts with those in ***Cherry,*** the court noted that Mrs. Luna made only four requests for money and the Air Force received no complaints about her; on the other hand, Colonel Cherry's wife made 23 requests for money and the Air Force had received information that should have triggered an investigation of Mrs. Cherry). Id. at 1107-08.

McNAMARA: I'm sorry, I don't.

DUNN: Okay, well, the thing is, his beeper was heard when he was first shot down indicating that he was still alive, and then six and a half hours later it was heard for twenty to seventy minutes. And you people sat there in that room for forty-five minutes, never using his name. He was always "the China Incident." He was twenty-five years old. So you never had a face to see. Or to know that he had a twenty-five-year-old wife and a baby, a one-year-old baby. But I'm that guy's wife. And on page six of the classified document that I received in 1992 . . . you said, "No rescue attempt should be made. Don't go after him. It's not worth it." And all these years, Mr. McNamara, I've wanted someone who was at that meeting to say to me, "I am sorry." And I'd like you to say that to me in front of all these people. "I am sorry.') Please. I just want you to say, "I am sorry."

McNAMARA: I have no recollection of the meeting, and I can't believe I—

DUNN: Well, it's right here.

McNAMARA: I understand what you have, but I haven't seen it and I'd like to see it.

DUNN: It's right here.

McNAMARA: But let me just say this, if I said it, I'm not sorry, I'm horrified.

DUNN: I'd like you to say to me, "I'm sorry, Maureen."

McNAMARA: Well, I'll say I'm sorry, but that's not enough. I am absolutely horrified.[208]

With the repatriation of American prisoners of war following the signing of the Paris Peace Accords on 27 January 1973, came fundamental challenges to the Missing Persons Act. Although it is difficult to imagine because of the Vietnam-era furor, the twelve-year conflict was actually America's most accounted-for modern war at that time.

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208 *Meeting McNamara: Robert S. McNamara Meets Vietnam Pilot's Wife Maureen Dunn*, HARPER'S MAGAZINE, July **1995,** at **14** (portions of a transcript of a **25** April **1995** exchange at Harvard University's Kennedy School of Government between Robert NcNamara and Maureen Dunn, the widow of a Vietnam veteran. The exchange took place during a question-and-answer session following a speech by McNamara to promote his book, ROBERT MCNAMARA, IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM (1995)). According to the article, Joseph Dunn was a Navy pilot shot down over Chinese territorial waters on 14 February **1968.** Robert McNamara was Secretary of Defense at that time. Although United States intelligence indicated Dunn survived the attack, no rescue attempt was made, largely because of the government's fear of drawing China into the war. *Id.*

The Second World War left some 78,000 American service members missing or otherwise unaccounted for,[209] and the United States had not accounted for over 8000 Americans after the Korean Conflict.[210]

At the end of the repatriation, dubbed "Operation Homecoming," in April 1973, the Department of Defense reported that 1929 persons were in a missing status in Southeast Asia: 1220 missing in action, 118 missing due to noncombat causes, and 591 prisoners of war. Under Service regulations, the Service Secretaries classified another 1118 as Killed in Action/Bodies Not Recovered (KIA/BNR).[211] The United States attempted to obtain from the North Vietnamese a full accounting of these service members through the Paris Peace Accords. Article 8(b) of the Accords provided:

> The parties shall help each other to get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of remains, and to take any such other measures as may be required to get information about those still considered missing in action.[212]

In late 1973, Senators Robert Dole and Jesse Helms offered an amendment to the Eagleton Amendment, which proposed to eliminate funding for military operations in Vietnam.[213] To enforce sec-

209 141 CONG. REC. S18,873 (daily ed. Dec. 19, 1995)(statement of Sen. McCain).

210 133 CONC. REC. H697 (daily ed. Feb. 18, 1987) (statement of Rep. Montgomery).

211 SENATE ON POW/MIA AFFAIRS REPORT, *supra* note 15, at 144.

212 Section 8(b) of the Paris Peace Accords is reprinted in the *Congressional Record* at 138 CONG. REC. S17,780 (daily ed. Oct. 8, 1992) [hereinafter Peace Accords].

213 The Eagleton Amendment provided that "[n]one of the funds herein appropriated under this Act [the 1973 Continuing Appropriations Resolution] or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over, or from off the shores of Cambodia or in or over Laos by United States forces." 119 CONG. REC. 17,124 (1973). Both Houses of Congress adopted the Eagleton Amendment. 119 CONG. REC. 17,693, 21,173 (1973). Although President Nixon vetoed the Eagleton Amendment, the President ultimately signed into law an amendment to the Continuing Appropriations Resolution which stated:

> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

The Joint Resolution Continuing Appropriations for Fiscal Year 1974, PUB. L. NO. 93-52, § 108, 87 Stat. 134 (1973). The President contemporaneously signed the Second Supplemental Appropriations Act of 1973, PUB. L. NO. 93-50, § 307, 87 Stat. 129, which provided:

> None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purposes.

tion 8(b) of the Paris Peace Accords, the Dole-Helms amendment would have authorized the President to use force "if the Government of North Vietnam is not making an accounting, to the best of its ability, of all missing in action personnel of the United States in Southeast Asia."[214] Senator Dole, sensing defeat for his amendment, remarked to his fellow Senators:

> I would hope those who read the record and those who sit down next year or 20 years from now to read the record, in the event the North Vietnamese do not carry out the agreement, will know that there were those of us in the Senate who stood and let our views be known.[215]

Over twenty years later, Senator Dole is still attempting to achieve his goal of a full accounting of service members unaccounted for in Vietnam, as evidenced by his sponsorship of The Missing Service Personnel Act of 1995.

A. *Secretarial Finding That a Missing Service Member Is* ***Dead***

After "Operation Homecoming" in 1973, there were many families of missing service members who still hoped for the return of their loved ones. Some of these families actively contested any change in status under the Missing Persons Act.[216] Their frustration centered around the provisions of the Missing Persons Act that define when a Service Secretary may declare a person in a missing status to be dead. The Missing Persons Act provides two types of determinations of death: an "official report of death" and a "finding of death."[217] This latter finding of death proved controversial. The Missing Persons Act requires the Secretary concerned to review a missing service member's case at the end of the twelve-month period in a missing status or when information warrants such a review.[218] After that review, the Secretary may direct that the service member be continued in a missing status if the member can reasonably be presumed to be living or the Secretary may make a "finding of death."[219] The Secretary may make a "finding of death" when he "considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in

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214 119 CONG. REC. 17,685 (1973).

215 *Id.*

216 ***See*** McDonald v. McLucas, 371 F. Supp. 831, 836 (S.D. N.Y. 1974) (three-judge court), *aff'd mem.*, 419 **US.** 297 (1974). The district **court** also noted that there were those who had accepted the apparent fate **of** death of their missing service members, and who wanted the services to make immediate determinations of death so that they might begin their lives anew. *Id.*

217 37 U.S.C. § 552(b) (Supp. **V** 1993).

218 *Id.* § 555.

219 *Id.*

a missing status is dead."[220]

During the Vietnam era, the Military Services had implemented the Missing Persons Act's twelve-month review requirement by establishing informal boards to review a missing person's status. After completing its review, the board would make a recommendation as to whether a determination of death should be made or whether the member should be continued in a missing status. The Secretary or his designee then reviewed the recommendation of the board and made a final determination.[221]

Some families charged that the Missing Persons Act allowed the Secretary to make an automatic "finding of death" after a service member had been in a missing status for twelve months without requiring any effort by the Secretary to locate the service member. Additionally, these family members reasoned that, once presumed dead, the Service would no longer attempt to locate the service member. In 1973, based on this assumption, several parents and spouses of missing service members filed a class action suit on behalf of all next-of-kin of American servicemen who had been carried in a missing status while on active duty in Indochina since 1 January 1962. The plaintiffs named all three Service Secretaries as defendants. The case, McDonald *v. McLucas,*[222] reflected the shifting attitude in the purpose of the Missing Persons Act.

In McDonald, the plaintiffs alleged that the sections of the Missing Persons Act that governed the circumstances under which the Military Services could declare a service member in a missing status to be dead were unconstitutional on their face and as applied, in violation of the Due Process Clause of the Fifth Amendment.[223] The plaintiffs argued that: (1) no statutory criteria guided the Secretary in deciding whether to make an official report of death or presumptive finding of death, (2) Congress had not delegated rulemaking authority to the Secretaries with respect to a finding of death, (3) no notice was given to the next-of-kin regarding the pendency of a status review nor any opportunity to be heard before a finding of death was made, and (4) the Missing Persons Act permitted the Service Secretary to make findings in the total absence of any evidence.[224]

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220 *Id.* § 556(b).

221 *See* McDonald v. McLucas, 371 F. Supp. 831, 833 (S.D. N.Y. 1974) (three-judge court), *aff'd mem.,* 419 U.S. 297 (1974).

222 371 F. Supp. 837 (S.D. N.Y. 1973); 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *affd mem.,* 419 U.S. 297 (1974).

223 *Id.* at 838 (citing 37 U.S.C. §§ 555, 556).

224 *Id.* In count three, the plaintiffs further alleged that the Service Secretary acted in an arbitrary and capricious manner in making findings of death because the

Because the plaintiffs sought an injunction restraining enforcement of an act of Congress for violating the United States Constitution, the district court judge decided that a three-judge panel must be convened to consider the facial attacks against the Missing Persons Act.[225] The judge also decided that the panel should hear and determine, if necessary, the plaintiffs' claim that the Services' application of the statute was unconstitutional.[226] The judge, therefore, issued a temporary restraining order pending the three-judge panel's determination of these issues. The restraining order applied to all members of the Army, Navy, Marines, and Air Force who were, on 20 July 1973, in a missing status while serving in Indochina. As of the date of the order, 6 August 1973, the Military Services were prohibited from making any official report of death or

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military services failed to search diligently for all available information about the missing service members. Therefore, the Secretarial findings of death were based on "pure speculation and guesswork." The court dismissed this claim, holding that a remedy based on this allegation was not available to the plaintiffs because they represented missing service members for whom the Services had not (yet)made findings of death. *Id.* at 839-40.

The Plaintiffs also alleged in count four that the findings of death made under the Missing Persons Act were subject to the Administrative Procedure Act (APA) (5 U.S.C. § 500) and that defendants failed to comply with the AFA. The court found this count to be without merit, as the APA clearly did not apply to the Missing Persons Act. In deciding this issue, the court cited to the APA's rule-making authority at 5 U.S.C.§ 553, which provides that it is inapplicable "to the extent that there is involved—(1) a military or foreign affairs function of the United States," or "(2) a matter relating to . . . public property, loans, grants, benefits, or contracts."McDonald, 371 F. Supp. at 840.

In count five, plaintiffs claimed that as a result of the findings of death, they were deprived of their constitutional rights as beneficiaries of the Paris Peace Accords of January 1973. The court found it unnecessary to make a determination as to this argument because it would not resolve the constitutional issues that must be addressed by the three-judge court. *Id.* at 840.

225 *Id.* at 839, At the time of this decision, 28 U.S.C. § 2282 (1970) required that an interlocutory or permanent injunction restraining the enforcement. operation or execution of any Act of Congress on grounds of unconstitutionality could not be granted unless heard and decided by a three-judge district court. Later, 28 U.S.C.$ **2282** was repealed by Act of August 12, 1976, PUB. L. No. 94-381, § 2, 90 Stat. 1119. In deciding whether to convene a three-judge court, the court noted that the Supreme Court had consistently held that due process under the Fifth Amendment required some form of notice and opportunity to be heard in administrative proceedings when adjudications of fact are made, and when a person is deprived of a protected interest. The court found a property interest involved in the monthly payments that accrue while a service member is carried in a missing status. The court further noted that a Service Secretary's authority to make presumptive findings of death under the Missing Persons Act, coupled with the lack of notice and opportunity to be heard, appeared to create an irrebuttable presumption of death. This also raised a substantial constitutional question because the Supreme Court had traditionally held that irrebuttable presumptions that act to deprive persons of protected interests violate the Due Process Clause of the Fifth Amendment (citations omitted). *McDonald*, **371** F. Supp. at 839-40.

226 McDonald, 371 F. Supp. at 839.

any finding of death with respect to these service members.[227]

Six months later, on 13 February 1974, a three-judge panel for the Southern District of New York permanently enjoined the Military Services from making determinations of death under the Missing Persons Act except in conformance with the court's opinion.[228] The court found the particular sections of the Missing Persons Act unconstitutional on their face and as applied insofar as they permitted the Service Secretaries to make official reports of death and findings of death without affording next-of-kin who are entitled to benefits under the Missing Persons Act notice and an opportunity to be heard.[229]

The court noted that prior Supreme Court decisions had established that procedural due process is required in administrative proceedings when adjudications of fact are made that may deprive a person of a constitutionally protected interest.[230] The court found that there was "no question that an 'official report of death,' or a 'finding of death' made by [the Service Secretaries] is an adjudication of fact."[231] The court next found that the plaintiffs had a property interest, protected by the Fifth Amendment, in the continuation of entitlements to pay and allowances granted to them under the Missing Persons Act. Therefore, the United States Constitution required the Services to provide such persons with notice and an opportunity to be heard before declaring that a service member in a missing status is dead.[232] The court declined, however, to prescribe the exact form of these procedures.

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227 *Id.* at 840-41. The court excepted the following actions:

(1) Defendants may proceed under Sections 555 and 556 of 37 U.S.C. as to any MIA if they receive from the primary next-of-kin a request in writing that they not delay action on the information in their possession.

(2) Defendants may continue or initiate any activity for the purpose of obtaining information about any MIA.

(3) Defendants may communicate any information so obtained now in their possession or hereafter acquired.

(4) Defendants may respond to any unsolicited inquiry from any family of any MIA not related to the allegations or merits of this action.

(5) Defendants may deliver the possessions or remains of any MIA to the primary next-of-kin.

228 McDonald v. McLucas, 371 F. Supp. 831 (S.D. N.Y. 1974) (three-judge court), *affd mem.*, 419 U.S. 987 (1974).

229 *Id.* at 837.

230 *Id.* at 834 (citing Hannah v. Larche, 363 U.S. 420 (1960); Morgan v. United States, 304 U.S. 1 (1938)).

231 *Id.*

232 *Id.* (citations omitted).

> We only hold that under minimum due process standards notice must be given of a status review and the affected parties afforded a reasonable opportunity to attend the review, with a lawyer if they choose, and to have reasonable access to the information upon which the reviewing board will act. Finally, they should be permitted to present any information which they consider relevant to the proceeding. Once that is done, the requirements of due process have been satisfied.[233]

In a subsequent decision, the Court of Claims refused, however, to apply *McDonald* retroactively to declare all prior determinations of death void *ab initio*.[234]

*B. Re-establishing Status Review Hearings **After** McDonald*

In **1974,** immediately following the declaratory judgment in *McDonald*, representatives of the Office of the Secretary of Defense and the Military Services met to decide how to implement the *McDonald* ruling.[235] Generally, they agreed that basic uniformity among the Services in administering the informal status review hearing was imperative and that the new procedures needed to be informal and not adversarial in nature. Consequently, procedures would not include cross-examination of witnesses, presentation of interrogatories, or the recording of testimony. They agreed further that the Services would send notices to the next-of-kin receiving financial benefits under the Missing Persons Act. These individuals would be known as "primary next-of-kin." Only these individuals could attend the status review; the Services would keep all other "secondary next-of-kin" informed of developments by mail. The Services also would grant the primary next-of-kin access to all information on which the status review would be based. Additionally, they agreed that the Services would review classified matter for declassification, but if the material could not be declassified, the primary next-of-kin would not be shown the material or informed of its existence. Moreover, the file reviewed by the hearing officer and the Secretary could not include any information not available to the next-of-kin.[236]

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233 *Id.* at 836. On May **26,** 1974, the Supreme Court refused a government application for stay of judgment and other relief. McDonald v. McLucas, 417 U.S. 905 (1974). Sixth months later, on 11 November 1974, the Supreme Court affirmed the judgment of the New York District Court in a memorandum opinion. McDonald v. McLucas, 419 **U.S.** 967 (1974).

234 ***See*** Crone v. United States, 538 F.2d 675 (Ct. Cl. 19761.

235 ***See*** Memorandum for Record, Department of Defense, Office of General Counsel, Washington, D.C., subject: McDonald v. McLucas, U.S.D., S.D. N.Y., 73 Civ. 3190 (Feb. 13, 1974) (Mar. 18, 1974) [hereinafter OGC Memorandum for Record].

236 In the spring of 1974, all the military services established policies complying with this agreement. ***See,*** *e.g.,* Department of the Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. § 551), approved by J. William Middendorf II. Acting

Even after adopting new policies in 1974, the Department of Defense continued to suspend all status reviews of missing service members under the Missing Persons Act, except when requested by next of kin or on receipt of conclusive evidence of death, such as the return of remains.[237] During this suspension, both the executive branch and the Congress investigated the fate of American service members missing in Southeast Asia.[238]

During 1973 and 1974, for example, the Senate Foreign Relations Committee, chaired by Senator Fulbright, held public hearings to review the problem of those still listed as prisoners of war and missing in action in Southeast Asia.[239] The House of Representatives Select Committee on Missing Persons in Southeast Asia also held hearings from 1975 through 1976. At the beginning of its tenure in 1975, the Select Committee requested that the Department of Defense continue to suspend status review hearing ~Chaired~ by Representative Sonny Montgomery, the committee known as the "Montgomery Committee" concluded in December 1976 that the Missing Persons Act "adequately protects the rights of the missing person and their next-of-kin."[241] The Montgomery Committee found that the massive efforts of the American combatant forces to recover their lost personnel were "unparalleled in the history of our nation and contributed significantly to rescuing more than half of all aviators shot down in Indochina and recovering remains of numerous ground force personnel."[242]

Additionally, the Montgomery Committee found that the Department of Defense "generally" gave "generous attention to the needs and desires of POW/MIA [prisoner of war and missing in action] next-of-kin."[243] It found, however, that, at the executive branch's direction, the Department of Defense "sometimes concealed actual loss sites during the 'secret war in Laos,' and that this misinformation later contributed to the mistrust expressed by next-of-

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Secretary of the Navy (Mar. 26, 1974) (on file with Office of POWIMIA, Military Personnel Command, Department of the Navy).

237 *But see In re* Estate of Rausch, 347 N.Y.S.2d 925 (1973) (holding that the federal court order restraining the military services from making an official report of death **of** any person declared to be missing in action did not restrain the New York state court from making a finding of death pursuant to laws enacted in its jurisdiction).

238 Between April 1973 and April 1975, however, North Vietnam returned the remains of only 23 United States personnel. DEPARTMENT OF DEFENSE POW-MIA FACT BOOK 4 (July 1990) [hereinafter POW-MIA FACT BOOK].

239 S. REP. No. 779, 93d Cong., 2d Sess. 3 (1974).

240 HOUSE SELECT COMMITTEE ON MISSING PERSONS IN SOUTHEAST ASIA, 94TH CONG., 2D SESS., SUMMARY, CONCLUSIONS AND RECOMMENDATIONS v (Comm. Print Dec. 1976) [hereinafter the Montgomery Committee].

241 *Id.*

242 *Id.* at 5.

243 *Id.*

kin." Moreover, according to the Montgomery Committee, "[tlhe military classification system figured prominently in the difficulty experienced by some MIA families and contributed to unnecessary confusion, bitterness, and rancor."[244]

In 1977, President Jimmy Carter appointed Leonard Woodcock to head the Presidential Commission on Americans Missing and Unaccounted for in Southeast Asia. This commission visited both Vietnam and Laos to discuss the issue of those unaccounted for from the Vietnam Conflict. During one of these visits in March 1977, the Vietnamese first announced that they had established an office to seek information on missing Americans and to recover remains.[245] Despite efforts to locate those missing in Southeast Asia, however, the Montgomery Committee, the Woodcock Commission, and the Department of Defense all concluded that there was no evidence that any American personnel were alive and being held against their will in Southeast Asia.[246]

By early 1977, President Carter was attempting to establish friendlier relations with Vietnam.[247] At the same time, however, the President had requested that the Pentagon forward recommendations on status reviews of those service members still carried in a missing status.[248] On **26** May 1977, Secretary of Defense Harold

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244 *Id.*

245 *See* POW-MIA FACT BOOK, *supra* note 238.

246 Memorandum, Secretary of Defense Harold Brown to President Jimmy Carter, subject: Status Reviews for Servicemen Missing in Southeast Asia (May 26, 1977), *reprinted in* 141 CONG. REC. S16,417 (daily ed. Oct. 31, 1995). *See infra* note 249 (memorandum from Secretary of Defense Harold Brown to President Jimmy Carter).

247 Those efforts eventually ended when Vietnamese troops occupied Cambodia and drove out Pol Pot's Khmer Rouge in January 1979. ***See*** George Black, *Republican Overtures to Hanoi,* THE NATION, June **4,** 1988, at 773.

248 ***See*** Memorandum, Secretary of Defense Harold Brown to President Jimmy Carter (February 14, 1977), *reprinted in* 141 CONG. *REC.* S16,417 (daily ed. Oct. 31. 1995):

> I understand that at your meeting on February 11 with leaders of the National League of Families, you indicated that the moratorium on unsolicited status changes for MIAs would continue. From our conversation before that meeting, my understanding is that the Department of Defense should go through all the files, getting ready to move on a program of unsolicited status changes later this year depending upon the outcome of negotiations with the Vietnamese.
>
> Do I correctly understand your wishes?

See *also* Memorandum, Michael Oksenberg, National Security Council, to Zbigniew Brzezinksi, subject: Forthcoming Paris Negotiations with the Vietnamese (Mar. 25, 1977), *reprinted in* 141 CONG. REC. S16,417 (daily ed. Oct. 31, 1995):

> You might wish to underscore to the President the desirability of toning down expectations, should a question arise at the press conference about the Paris negotiations.
>
> The Vietnamese media have been vitriolic in their attacks on the U.S. They have explicitly linked aid to recognition. They have begun to

Brown wrote to President Carter recommending that, "given the overwhelming probability that none of the MIAs ever will be found alive," the Service Secretaries should be allowed to conduct status reviews "as mandated by law even though we have not received a full accounting."[249] Secretary Brown assured President Carter that

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release additional communications which passed between the Nixon Administration and the DRV.

Among other considerations, the hardened mood makes it unlikely that we will be obtaining more information on MIAs. At the same time, in response to the President's request, the Pentagon is forwarding recommendations on status reviews of the MIAs. The Pentagon will recommend that case reviews go forward, *i.e.*, that MIAs be declared KLA [sic, KIA]. This will place the President in a difficult political position, should he decide to accept the Pentagon's recommendation. He had earlier pledged not to allow case reviews until an adequate accounting had been obtained. And he had raised public expectations that the Vietnamese were going to be more forthcoming on MIA information. Now it looks as if we may be in a deep freeze for at least many months.

Placed in the broadest context, when one considers the Vietnamese statements as well as Congressional votes against aid to Vietnam, we see the inability of two bitter enemies swiftly to place the past behind them, as the President had hoped.

249 Memorandum, Secretary of Defense Harold Brown to President Carter, subject: Status Reviews for Servicemen Missing in Southeast Asia (May 26, 1977), *reprinted in,* 141 CONG. REC. S16,417) (daily ed. Oct. 31, 1995):

You have asked for my recommendations concerning status reviews for MIA.

As you know, since mid-1973 DoD has conducted status reviews only upon the written request of a missing serviceman's primary next of kin or upon receipt of conclusive evidence of death, such as the return of his remains. The Woodcock Commission concluded (as had the House Select Committee on Missing Persons in Southeast Asia and the Department of Defense) that there is no evidence that any American servicemen are alive and being held against their will in Southeast Asia.

It is true that the Southeast Asian governments probably have significantly more information about our missing men than they have given to us. There is no reason to believe, however, that continuing to carry servicemen as missing in action puts pressure on Hanoi to provide information on our missing men. In fact, the opposite is probably true; it puts pressure on us to make concessions to Hanoi. Status reviews, and obtaining of a complete accounting, are two distinct issues. An accounting that confirms death by direct evidence validates a declaration or presumption of death for a missing serviceman, but it is not a legal prerequisite to a status change.

Given the overwhelming probability that none of the MIAs ever will be found alive, I believe the time has come to allow the Secretaries of the Army, Navy and Air Force to exercise their responsibilities for status reviews as mandated by law even though we have not received a full accounting.

Reinstatement of reviews will of course be controversial. Certain members of the Congress, some families of the missing men, and others will charge that it is an abandonment of MIAs.

. . . .

The resumption of reviews will be preceded by (1) an expression of our strong commitment to obtaining further information about the

the procedures for status reviews met legal requirements and were uniform throughout the Department of Defense. The Secretary explained that status reviews and obtaining a complete accounting were two different issues. A service member may be presumed dead under the Missing Persons Act. To be "accounted for,'' however, death must be confirmed by direct evidence.[250] Then, in August 1977, the government announced that it would resume status reviews under the Missing Persons Act of those service members still in a missing status from the Vietnam Conflict.[251]

C. Challenges to Status Review Boards

Immediately following the government's announcement, parents and "next friends" of several missing service members filed a motion in the Eastern District of New York. The plaintiffs requested a preliminary injunction to prevent the President and the Department of Defense from instituting or continuing status reviews under the Missing Persons Act. The district court denied their motion and the plaintiffs appealed.[252] The United States Court of Appeals for the Second Circuit affirmed the district court's decision and in denying plaintiff's motion stated:

> There is nothing that the government of a grateful people can ever do fully to compensate or comfort the next of kin of those who have given "the last full measure of devotion," and for whom there is no hope of return. But it is beyond dispute that the government now provides every opportunity for the discovery and consideration of any evidence militating against a determination of death. The government is acting generously and compassionately in sparing no pains to ascertain as conclusively as possible

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missing men and (2) careful preparation of concerned groups for the change of policy. The decision will be discussed forthrightly with the National League of Families. Appropriate Senate and House leaders and key members will be given advance notice.

The procedures for status reviews will be uniform among the Military Departments, in accordance with legal requirements, and announced through simultaneous letters from the Service Secretaries to the POW/MIA families.

The public will be informed of the reasons for reinstituting status reviews and assured that this does not detract from our determination to obtain an accounting. (I suggest that the public announcement would be most effective coming from you, but I am prepared to make it instead).

250 *Id.*

251 ***See*** Hopper v. Carter, 572 F.2d 87, 88 (2d Cir. 1978) (discussing the government's announcement that it would resume status review hearings).

252 Hopper v. Carter, No. 77-1793, slip op. (E.D.N.Y. Dec. 19, 1977), *aff'd,* 572 F.2d 87 (2d Cir. 1978).

> what has actually happened to those missing in action before reaching any determination adverse to their interests or those of their next of kin, The conclusion is inescapable that the measures taken by the government suffice to defeat any claim that the constitutional rights of the plaintiffs are being or may be violated.[253]

Many families of service members who had not come home from Southeast Asia did not agree. For them, the Missing Persons Act was not a law "enacted solely for the purpose of affording some financial support for the families of missing members . . . during the time their fate was unknown."[254] Rather, it was a law that allowed the military to write-off their loved ones by declaring them dead without making any attempt to locate these persons. Consequently, some family members continued to litigate any attempt by the Military Services to declare their loved ones dead, not because they wanted the service member's pay and allowances, but because they wanted the government to continue its efforts to discover what happened to their loved ones. Federal courts dismissed many of these suits, however, based on a lack of standing or a failure to exhaust administrative remedies. When not dismissed on these bases, challenges to status review hearings generally alleging noncompliance with due process, the Freedom of Information Act, and the Paris Peace Accords ordinarily were unsuccessful.

1. Standing to Challenge Status Decisions—In Crone *v.* United *States,*[255] the Court of Claims held that dependents who are entitled to allotments of a missing service member's pay and allowances have standing to sue under the Missing Persons Act.[256] These individuals may sue to prove that their allotments were unlawfully discontinued because a determination of death was unlawful.[257] According to the Court of Claims, the standard of review is whether a determination is supported by substantial evidence. Further, the Court of Claims found that claimants are entitled to a ***de*** *novo* trial on the disputed issues of fact.[258] The Court of Claims decided, how-

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253 ***Hopper,*** 572 F.2d at 88.

254 Bell v. United States, 366 U.S. 393,408(1961).

255 538 **F. Supp.** 875 (Ct. Cl. 1976), *reh'g granted,* 210 Ct. Cl. 748 (1976).

256 *Id.* at 883. The Court of Claims found that it had jurisdiction pursuant to 28 U.S.C. § 1491 (1988)because plaintiffs claimed monetary relief under the Missing Persons Act. *Id.* at 877.

257 *Id.* at 883. The Court of Claims also indicated that a dependent wife may have standing to sue under the Missing Persons Act, even though the appropriate authority immediately had declared her husband to be dead. The court stated that the issue of the wife's standing to sue is intertwined with the possibility of her right to recover under the Missing Persons Act if she can establish that her husband should have been placed in a missing status, and not immediately declared dead. *Id.*

258 *Id.* at 887.

ever, that parents do not have the right to challenge death determinations unless they are eligible under the Missing Persons Act to receive their children's pay and allowances.[259] In so deciding, the Court of Claims observed that there appeared to be no congressional intent to extend the protections and benefits conferred by the Missing Persons Act to persons other than dependents and the missing persons themselves.[260]

Additionally, parents cannot establish standing to sue simply because a Military Service has extended them some procedure during the status review hearing. For example, in 1978, the parents of Marine Lieutenant Colonel Gary Fors received notice that the Marines Corps Missing and Captured Review Board would review their son's missing in action status. The notice stated that the parents were allowed to attend a hearing, with or without private counsel, to review all evidence to be considered by the board and to present any additional evidence for review. After the board recommended that Lieutenant Colonel Fors' status be changed to killed in action, the parents filed suit, seeking to have their son's status restored and to enjoin the Secretary of the Navy from adjusting the status without court order. The district judge dismissed the complaint for lack of standing because Mrs. Fors (the only living parent at the time of the decision) was not a "dependent" as defined by the Missing Persons Act.[261]

On appeal, Mrs. Fors argued that the government was estopped to deny her standing because it had considered her next-of-kin and allowed her some rights under the Missing Persons Act, as interpreted by *McDonald*.[262] The United States Court of Appeals for the Ninth Circuit disagreed, finding that the process extended to Mrs. Fors was not a right, but a privilege, and Congress intended the Missing Persons Act to benefit only the dependents of missing service members. Consequently, the Marine Corps's extension to non-dependents of certain procedures did not change the purpose of the Missing Persons Act nor extend standing to nondependents.[263]

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259 ***See*** McDonald v. McLucas, 371 F. Supp. 831, 834 (S.D. N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974) (finding that next of kin who receive monthly payments under the Missing Persons Act while a member is carried in a missing status have a right to procedural due process in administrative proceedings where adjudications of fact are made that may deprive them of those payments).

260 *Crone*, 538 F. Supp. at 882.

261 Fors v. Hildago, No. C80-421T, slip op. (W.D. Wash. Aug. 4, 1983), *aff'd sub nom.* Fors v. Lehman, 741 F.2d 1130 (9th Cir. 1984). The Missing Persons Act defines a "dependent" as a spouse, an unmarried child (including an unmarried dependent stepchild or adopted child) under 21 years of age, a dependent mother or father, a dependent designated in official records, or a person determined to be dependent by the Secretary concerned, or his designee. 37 U.S.C. § 551(1) (1988).

262 Fors v. Lehman, 741 F.2d 1130, 1134 (9th Cir. 1984).

263 *Id.*

Parents were, therefore, stymied in their efforts to stop the Military Services from changing the status of their children, unless the parents were entitled to benefits under the Missing Persons Act.[264] Spouses of missing service members, however, as beneficiaries under the Missing Persons Act, continued to file suit attempting to stop status reviews.

2. Challenges Prior to Secretarial Action—Federal courts have consistently dismissed complaints attempting to enjoin Service Secretaries from taking action on a board recommendation, finding them to be premature. In Darr *v. Carter,*[265] for example, the United States Court of Appeals for the Eighth Circuit denied a motion to enjoin the Secretary of the Air Force from acting on a status review board recommendation that Captain Charles Darr's status be changed from missing in action to killed in action. The Eighth Circuit held that allowing the action would be an improper and premature interference with the administrative process.[266]

3. Due Process Challenges—In 1979, the wife of Air Force pilot Captain Francis Townsend filed suit attempting to prevent the Air Force from acting on a recommendation by a board of officers that her husband's missing in action status be changed to killed in action.[267] Mrs. Townsend argued in part that the hearing violated her due process rights under the Fifth Amendment.

First, Mrs. Townsend argued that her due process rights were violated because the board was not impartial in that the board members may have been subject to command pressure in rendering their

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264 ***See,*** *e.g.,* Crone v. United States, 210 Ct. Cl. 748, 749 (1976) (finding that there may be an issue of fact as to whether plaintiff Velma Crone was the financial dependent of her son because if she was a financial dependent, she had standing to sue under the Missing Persons Act).

265 640 F.2d 163 (8th Cir. 1981).

266 *Id.* at 164. The court noted that the exhaustion and finality requirements are not without exception. Immediate judicial review is appropriate only if there is a showing that the denial of the same will subject the plaintiff either to irreparable injury or an inadequate remedy. *Id.* at 165 (citation omitted). In Mrs. Darr's case, the court found that she had not demonstrated irreparable injury incident to the orderly procedures of the Air Force regulation, nor had she shown injury due to extraordinary litigation expense, unreasonable administrative delay, or lack of jurisdiction on the part of the Secretary of the Air Force. Additionally, she had not shown that her administrative remedy was not adequate. As the court observed, the only deprivation in this case would arise at the conclusion of agency proceedings if the son's status was changed. *Id. See also* Lewis v. Reagan, 660 F.2d 124 (5th Cir. 1981) (adopting the reasoning in *Darr* and finding plaintiff's suit to be premature); Evans v. Secretary of the Army, No. 79-3104, slip op. (N.D. Ill. Feb. 7, 1980) (granting a defense motion to dismiss and finding that plaintiff had not exhausted her administrative remedies by: (1) applying to the Army Board for Correction of Military Records to correct errors in the decision to change Captain Kenneth Yonan's status, as provided by 32 C.F.R. § 581.3 (1995); and (2) requesting the Secretary of the Army to reconsider his decision to change that status, as provided in 37 U.S.C. § 556(d) (1988)).

267 Townsend v. United States, 476 F. Supp. 1070 (N.D. Tex. 1979).

decision. The United States District Court for the Northern District of Texas rejected this argument, finding that because board members were members of the Air Force did not automatically bar them from acting as impartial decision makers.[268]

Second, Mrs. Townsend alleged that she was denied her right to cross-examination, She argued first that because the officers were asked to rely on their combat experience, any decision they reached was based in part on that experience, which was not presented at the hearing and not subject to cross-examination. The district court disagreed, finding that courts had previously approved fact-finding panels that drew on their particular backgrounds in making a decision.[269] Mrs. Townsend also argued that she was denied her right to cross-examination because the board's decision was partially based on classified information that was not available to her. The district court found no merit to this claim. It noted that the classified information pertained only to sources and methods of gathering information in Vietnam and that the Air Force provided Mrs. Townsend with extracts from that information. Additionally, the district court observed that the board made a specific finding that the classified information did not affect its decision.[270]

Third, Mrs. Townsend argued that her due process rights were violated because the Air Force did not make available over 15,000 pages of unrelated documents (that is, documents not identified as pertaining to any particular individual) until after the hearing. The Air Force had, however, released all unclassified correlated information relating to Captain Townsend. The district court found this allegation to be without merit because Mrs. Townsend made no claim that the unrelated documents contained any new information.[271]

Fourth, Mrs. Townsend argued that it was impossible for the Air Force to make a fair determination of the status of a missing service member until it examined all possible sources of information. In rejecting this argument, the district court found that due process did not mean interminable delay. The court reasoned that a decision made after notice and hearing and with reasonable promptness is not invalid simply because "every conceivable source of information, however remote or conjectural, has not been exhausted."[272]

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268 *Id.* at 1072 (citing Goldberg v. Kelly, 397 U.S. 254, 271 (1970)).

269 *Id.* at 1073 (citing Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970)). The court also noted that the board members' experience enabled them to consider and draw on reasonable inferences from that experience. Moreover, the status review procedure provided for a voir dire of the board members to decide whether any should be disqualified for cause. *Id.*

270 *Id.* at 1073.

271 *Id.* at 1072.

272 *Id.* at 1074.

Finally, Mrs. Townsend complained of a lack of formal discovery proceedings. The district court found, however, that due process did not require a trial-type hearing in every conceivable case.[273] It further noted that "[t]he status review hearing is not the kind of situation which requires an adversarial, trial-type hearing."[274]

4. Freedom *of* Information Act *Challenges*[275]—Mrs. Townsend also argued that the government failed to maintain and provide records in a timely and complete manner, as required by the Freedom of Information Act (FOIA). Specifically, she alleged that the Air Force violated the FOIA by failing to provide board members with certain documents until the hearing and by failing to disclose the unrelated documentation before the hearing. Mrs. Townsend complained that these failures violated the FOIA requirement to maintain records in a timely and complete manner.[276] The district court found both arguments to be without merit. The court determined that the records were not disclosed to the board prior to the hearing to prevent preconceptions by the board and that the records on Captain Townsend had been maintained as required.[277]

Additionally, in *Lewis v. Reagan,*[278] the United States Court of Appeals for the Fifth Circuit addressed whether the government must act on a primary next of kin's FOIA request before a status review hearing could be convened. The Fifth Circuit held that the mere pendency of a FOIA request, or appeals from denials of access to such information, did not give rise to the irreparable injury necessary to enjoin a status review hearing under the Missing Persons Act.[279]

5. Paris Peace Accords *Challenges*—Finally, family members argued that a change in status from missing to killed in action would result in a loss of their constitutional rights as beneficiaries of section 8(b) of the Paris Peace Accords.[280] In Darr *v. Carter,*[281] the United States District Court for the Eastern District of Arkansas rejected this argument, holding that a presumptive finding of death

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273 *Id.* (citing Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 894 (1961); Woodbury v. McKinnon, 447 F.2d 839, 844 (5th Cir. 1971)).

274 *Id.*

275 5 U.S.C. § 552a (1988).

276 *Townsend,* 476 F. Supp. at 1074 (citing 5 U.S.C. § 552a(a)(5), (e)(5)).

277 *Id.*

278 660 F.2d 124 (5th Cir. 1981).

279 *Id.* at 128.

280 *See* § 8(b) of the Paris Peace Accords, *supra* note 212 and accompanying text. Plaintiffs first raised this claim in *McDonald,* but the district court found it unnecessary to decide this matter because it would not resolve the constitutional due process issues to be decided by the three-judge panel. McDonald v. McLucas, 371 F. Supp. 837, 840 (S.D. N.Y. 1973); 371 F. Supp. 831 (S.D. N.Y.) (three-judge court), *aff'd mem.,* 419 U.S. 987 (1974).

281 487 F. Supp. 526 (E.D. Ark. 1980), *aff'd,* 640 F.2d 163 (8th Cir. 1981).

did not alter the government's obligation under the Paris Peace Accords to continue its efforts to locate those persons as to whom no conclusive information of death had been received. The district court noted that "[tlhe government had demonstrated no such interpretation of the change of status, and the finding may be reconsidered upon discovery of additional facts or documents."[282]

As reflected in the above court decisions, after the Military Services implemented procedures required by *McDonald,* the courts generally did not interfere in secretarial decisions under the Missing Persons Act. Implementation of these procedures did not, however, dispel the belief by some individuals that the United States had left behind service members in Southeast Asia.

D. Government Efforts to Locate Persons Unaccounted for in Southeast Asia

In 1979, Private First Class Robert Garwood, United States Marine Corps, returned from Vietnam after fourteen years.[283] On 22 March 1979, Private Garwood stepped off a plane in Bangkok, Thailand, and a Marine Corps official advised him that he was under investigation for certain criminal activities, including desertion.[284] The Marine Corps ultimately convicted Private Garwood of communicating with the enemy and assault on an American prisoner of war.[285] He was sentenced to be discharged from the Marine Corps with a dishonorable discharge, to forfeit all pay and

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282 *Id.* at 528.

283 *See* Memorandum, Michael Oksenberg, National Security Council, to David Aaron, subject: League of Families Meeting with the President (March 7, 1979), *reprinted in* 139 CONG. REC. S8,565 (daily ed. July 1, 1993).

> A live American defector had been sighted in Hanoi and has indicated that he wishes to return to the United States. The Vietnamese had previously given no indication that there were any live Americans in Vietnam—although they clearly knew about this case. The defector has also claimed that he knows of other Americans, apparently, who are alive in Vietnam. It is politically wise perhaps for the President to protect himself on this issue by reasserting his continued interest in a full accounting.

284 *See* United States v. Garwood, 16 M.J. 863, 866 (N.M.C.M.R. 1982), *aff'd,* 20 M.J. 148 (C.M.A. 1985), *cert. denied,* 474 U.S. 1005 (1985). Following a UCMJ Article 32 investigation, the Marine Corps charged Private Garwood with desertion (in violation of UCMJ art. 85 (1988)), solicitation of United States troops in the field to refuse to fight and to defect (in violation of UCMJ art. 82 (1988)), communication and holding intercourse with the enemy (in violation of UCMJ art. 104 (1988)), and misconduct as a prisoner of war (in violation of UCMJ art. 105 (1988)). Following presentation of the case in chief, the military judge granted Private Garwood's motion for findings of not guilty on the desertion and solicitation charges, and one specification of the maltreatment charge.

285 UCMJ arts. 104, 128 (1988).

allowances, and to be reduced to pay grade E-1.[286] Although the evidence indicated that Garwood had remained in Vietnam voluntarily, his return was, nevertheless, proof that Americans remained in Southeast Asia after the end of the war.

> The unexpected return of PFC Garwood touched off hopes among the families of some servicemen still unaccounted for in Southeast Asia that their husbands and sons may still be alive . . . and brought renewed pressure on several Congressmen to reopen the sensitive question of Americans missing in Southeast Asia.[287]

Despite the hope of some family members that their missing service members survived, by the early 1980s the Services had declared all but one of those previously determined to be prisoners of war or missing in action in Southeast Asia to be dead under the Missing Persons Act, either under an official report of death or a finding of death. In cases where remains had not been recovered, the Services transferred these service members from a missing status to a KIA/BNR status. As a symbolic gesture, the government continued to list Air Force Colonel Charles E. Shelton of Owensboro, Kentucky, as a prisoner of war.[288]

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286 *Garwood,* 16 M.J. at 865. The testimony at trial from fellow prisoners of war revealed that Private Garwood was not simply a prisoner of war who had been held against his will in Vietnam for 14 years. For example, Garwood acted as an interpreter during political indoctrination classes given to American prisoners of war; he acted as an informer to enemy captors regarding prohibited activities of the American prisoners; he served as an interrogator of Americans on their initial entry into the camps; and he assaulted an American prisoner following an incident in which an enemy camp commander's cat had been killed for food by the American prisoners of war. *Id.* at 866.

287 *PFC Garwood's Return Renews Families' Hopes,* RALEIGH NEWS, May 25, 1979, at A1.

288 135 CONG. REC. H973 (daily ed. Apr. 6, 1989) (statement by Rep. Rowland). *See also* 136 CONG REC. S5,898 (daily ed. May 9, 1990) (statement by Sen. Ford):

> On April 29, 1965, Colonel Shelton was piloting RF101C during a routine reconnaissance mission over Laos when he was shot down. Another American pilot witnessed Shelton parachuting to the ground, and Shelton informed the pilot by radio contact that he was safe. According to a village witness, and later confirmed by U.S. rallier reports, Colonel Shelton was captured by Pathet Lao Forces.
>
> According to a CIA report, three years after his capture, three communist soldiers escorted Colonel Shelton to a North Vietnamese Army office. As the soldiers were attempting to chain Colonel Shelton to a desk, he managed to obtain the chain and killed the soldiers in self-defense.
>
> In 1971, Colonel Shelton and another American were briefly rescued, but were later recaptured by the Vietnamese. Because he remains in a "missing status" as a prisoner of war, the United States Treasury continues to issue monthly checks to Colonel Shelton's wife, made payable to Charles E. Shelton.

Further complicating the issue of missing service members, the Department of Defense began in the early 1980s to include in the definition of "unaccounted for" all service members originally categorized as KIA/BNR and those initially classified as missing.[289] This led to a dramatic increase in the number of unaccounted for service members. It also resulted in a situation wherein there were more Americans currently considered unaccounted for from Southeast Asia than immediately after the war. This policy was due in large part to litigation initiated by families of prisoners of war and of those missing in action and to congressional pressure.[290]

During the early 1980s, Congress continued to devote many hours to accounting for service members from Southeast Asia, including hearings by a special task force under the Subcommittee on Asian and Pacific Affairs, House Foreign Affairs Committee.[291] Additionally, President Ronald Reagan declared that his administration "attached the highest priority to the problem of those missing in action."[292] Also during this time, the government coordinated its policy on prisoners of war and those missing in action through the prisoner of war and missing in action (POWIMIA) Interagency Group (IAG). Membership in the IAG included the Department of Defense, the Joint Staff, the White House National Security Council staff, the State Department, the Defense Intelligence Agency, and the National League of POW/MIA Families.[293]

Then, in 1984, the government of Laos allowed an American team to excavate the crash site of an American aircraft shot down in Laos in 1972. Shortly thereafter, an American team visited a crash site of an American aircraft shot down near Hanoi. This was the first time in twelve years that Americans had examined crash sites

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289 Prior to the 1980s, the Department of Defense considered only service members initially classified as missing to be "unaccounted for." SENATE POW/MIA AFFAIRS REPORT, *supra* note 15, at 158.

290 *Id.*

291 131 CONG. REC. 19,620 (1985).

292 President's Remarks on Signing a Resolution and a Proclamation Declaring National POW/MIA Recognition Day, 1981 PUB. PAPERS 508 (June 12, 1981). ***See*** *also* S. CON. RES. 46, 99th Cong., 1st Sess., 99 Stat. 1938-39 (1985) (providing that it was the "sense of Congress" that President Reagan should "ensure that officials of the United States Government consciously and fully carry out his pledge of highest national priority to resolve the issue of two thousand four hundred and eighty-three Americans still missing and unaccounted for in Indochina" and encouraging the President to "work for the immediate release of any Americans who may still be held captive in Indochina"). *But* ***see*** 131 CONG. REC. 19,622 (1985) (statement by Rep. Montgomery objecting to the above language, because he had been involved in the prisoner of war, missing in action issue "for some 15 years and [had] made 13 trips to Southeast Asia" and while he "sincerely hope[d]" that he was wrong, it was his opinion "that no Americans are being held captive against their will in Indochina as a result of our involvement in the Vietnam War").

293 POW-MIA FACT BOOK, *supra* note 238.

in Indochina.[294] It appeared that Laos and Hanoi were finally cooperating. Hanoi agreed to an increase in the schedule of government-to-government technical meetings and returned several sets of American remains.[295] Also, the government of Laos People's Democratic Republic allowed an American excavation team to inspect and work at a crash site near Pakse, Laos. The team recovered thousands of bone and tooth fragments, personal effects, and military identification tags. As a result of the recovery efforts, the United States Army Central Identification Laboratory in Hawaii identified fifteen remains.[296]

With the government's continuing efforts to recover remains and account for service members came a shift in focus by family members dissatisfied with government accounting efforts. Instead of concentrating on the Missing Persons Act and status decisions thereunder, families began challenging the process of remains identifications.

E. Challenges to Service Accounting Decisions

Because service members were no longer in a missing status under the Missing Persons Act, families based their challenges to Service accounting decisions on other federal law, including the Federal Tort Claims Act (FTCA) and the Hostage Act. As in earlier claims filed under the Missing Persons Act, however, these latest challenges generally were not successful.

1. Federal Tort Claims Act[297]—One of those identified at the Pakse crash site in Laos was Lieutenant Colonel Thomas Hart. As a result of that identification, the wife of Lieutenant Colonel Hart became the first family member to refuse to accept the remains of a service member from Southeast Asia. In 1972, Lieutenant Colonel Hart and fifteen other crew members were on board an Air Force AC-1304 Spectre when it was hit by antiaircraft fire. The Air Force originally placed Lieutenant Colonel Hart in a missing status, but after conducting a review in 1978 under the Missing Persons Act, the Air Force changed his status to KIA/BNR. In 1985, a United States Army Central Identification Laboratory team recommended to the Armed Services Graves Registration Office that the crew members be listed as identified. Mrs. Hart's own expert examined the remains and concluded it was impossible to tell whether the

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294 131 CONG. REC. 19,620 (1985) (statement of Rep. Solomon).

295 *Id.* (statement of Rep. Gilman).

296 *Id. See also* Hart v. United States, 894 F.2d 1539, 1542 (11th Cir. 1990), **cert. denied,** 498 U.S. 980 (1990) (regarding one of those service members identified as a result of the Pakse excavation).

297 28 U.S.C. §§ 2671-80 (1988).

fragments came from Lieutenant Colonel Hart. Mrs. Hart then refused to accept the remains. The Graves Registration Office eventually rescinded the identification based on an independent study commissioned by the Army that concluded it could confidently confirm only two of the crash site identifications.

However, when the government refused to return Lieutenant Colonel Hart to an unaccounted for (KIA/BNR) status, Mrs. Hart, her daughter, and Lieutenant Colonel Hart's mother filed suit in the United States District Court for the Northern District of Florida under the FTCA claiming intentional infliction of emotional distress. The district court held the government liable to all three plaintiffs.[298] On appeal, however, the United States Court of Appeals for the Eleventh Circuit reversed the district court's decision. The Eleventh Circuit held that government efforts to identify deceased personnel clearly fell within the discretionary function exception to the FTCA.[299]

Shortly after the United States excavated the Pakse crash site, a joint United States-Laotian search and recovery team excavated the site of an AC-130 crash in southern Laos. The gunship had exploded and crashed in 1972 after being struck by a surface-to-air missile. The Air Force listed Senior Master Sergeant Robert E. Simmons, among other crew members, as missing in action from the date of that crash. In 1977, the Air Force changed his status from missing in action to KIA/BNR after a status review under the Missing Persons Act.

The recovery team excavating the site in 1986 recovered a tooth among the remains which the United States Central Identification Laboratory in Hawaii determined to be the upper right second molar of Simmons. Based on this identification, the Air Force changed Master Sergeant Simmons' status from KIA/BNR to KIA "body recovered." Simmons's mother then filed a claim with the Air Force stating that she had suffered emotional distress because the Air Force had informed her by telephone while she was at work that her son's status "would be changed from missing in action to

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298 Hart v. United States, 681 F. Supp. 1518 (N.D. Fla. 1988), *rev'd*, 894 F.2d 1539 (11th Cir. 1990), ***cert. denied,*** 498 U.S. 980 (1990).

299 Hart v. United States, 894 F.2d 1539, 1544 (11th Cir. 1990), ***cert. denied,*** 498 U.S. 980 (1990). The Federal Tort Claims Act (FTCA) does not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1988).

killed in action based on the discovery of a single tooth."[300]

After the Air Force denied her claim, Mrs. Simmons filed suit in federal district court.[301] She alleged that her claim under the FTCA accrued in 1987, based on the Air Force notification that her son was positively known to be dead, when the Air Force knew or should have known that discovery of a tooth does not confirm death. She claimed that the Air Force's action constituted deliberate infliction of emotional harm, compensable under the FTCA. The district court disagreed, finding that portions of Mrs. Simmons' complaint challenging the finding of death based on the discovery of one tooth were incorrect because the Air Force determined in 1977 after a status review hearing that her son was killed in action. According to the district court, the Air Force did not intend to verify death when it identified the tooth in 1987. Rather, its intent was to recover the remains of service members who were killed in action in Vietnam. Therefore, the district court decided that any damages suffered as a result of her son's change in status to killed in action accrued in 1977. Consequently, the claim for damages under the FTCA was barred by the statute of limitations.[302]

Mrs. Simmons also argued that the government failed to adhere to its own guidelines in excavating, documenting, and identifying remains. However, the district court agreed with the Eleventh Circuit's holding in *Hart* that such a claim was barred by the discretionary function exception to the FTCA.[303]

Family members also filed suit under the FTCA arguing that a Military Service was negligent in its original classification decision. For example, in *Vogelaur v. United States,*[304] the mother of Private Alan Barton, a soldier who disappeared in Vietnam, filed an action under the FTCA claiming that the Army was negligent in investigating the circumstances of her son's disappearance in Vietnam and

300 Simmons v. United States, **754** F. Supp. **274, 277** (N.D. N.Y. **1991).** Plaintiffs claim again demonstrated the confusion between the status of missing in action under the Missing Persons Act and KIA/BNR under Service regulations.

301 *Id.*

302 *Id.* at **278.** A claimant must file an administrative claim with the agency within two years of the time the claim accrues as a condition precedent to suit under the FTCA. **28** U.S.C. § 2401(b) **(1994).** The court noted that a claim challenging the Air Force's decision to change plaintiffs status from KIA/BNR to KIA, body recovered, on the basis of one tooth was not barred, as it accrued in **1987.** Plaintiffs claims were not, however, based on this change of status. *Id.* at **279.**

303 *Id.* at **280.** The court found that pertinent regulations did not prescribe a specific set of procedures in either the search or identification policies promulgated by the military. Therefore, the government employees involved in the excavation and identification were forced to exercise their discretion in determining what procedures to follow and which forms to fill out documenting the excavation and identifying the remains. *Id.*

304 665 F. Supp. **1295** (E.D. Mich. **1987).**

improperly classified him as a deserter. The Army recovered Private Barton's remains in Vietnam in 1972 but did not identify them until 1983 due in large part to an Army mistake omitting his name from an "in-Vietnam" deserter list.

The district court held that the mother's claim that the Army was negligent in its original investigation and classification of her son as a deserter was barred under the FTCA by both the foreign country exclusion[305] and the combat exclusion.[306] The district court also found that accounting for and recovering the remains of service members in a combat theater during time of war is a non-justiciable political question.[307] It further found, however, that the identification process changed once the war was over and the remains and identification system returned to the United States. Therefore, the plaintiff may be able to recover for the government's failure to identify and deliver her son's remains in a timely fashion.[308]

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[305] *See id.* at 1300 (quoting the FTCA, 28 U.S.C. § 2680(k), which provides that "[tlhe provisions [of the FTCA] shall not apply to any claim arising in a foreign country").

[306] *See id.* at 1301 (quoting the FTCA, 28 U.S.C. § 2680(j) (1994), which precludes "any claim arising out of the combatant activity of the military or naval forces or the Coast Guard, during time of war").

[307] *Id.* at 1302. *See also* Dumas v. United States, 554 F. Supp. 10 (D. Conn. 1982) (dismissing plaintiff's claim that his brother's "civil and constitutional rights" were violated when the government failed to obtain his timely release from a Korean prisoner of war camp in 1953. The district court found that these claims presented either not justiciable political questions or fell within the combat exclusion and the discretionary function exceptions to the FTCA. However, the district court did allow the plaintiff to continue with his claim that the Secretary of the Army had wrongfully classified his brother as missing in action, when in fact he was a prisoner of war. The Army ultimately corrected these records to reflect that the plaintiffs brother had been held as a prisoner of war); Midgett v. United States, 603 F.2d 835 (Ct. Cl. 1979) (directing that the Secretary of the Army correct Private Midgett's records to reflect that he had died on November 25, 1967 in Vietnam. After Private Midgett disappeared in Vietnam, the Army declared him absent without leave and subsequently discharged him as a deserter. The court found that the stigma associated with the Army's characterization of a service member as a deserter, after he had disappeared and was presumably deceased in a combat zone, requires strict scrutiny. The court then held that the Army Board for Correction of Military Records' decision not to change Private Midgett's records was arbitrary and capricious, contrary to law, and unsupported by substantial evidence. The court found that the board's reliance on the administrative presumption of desertion, and the uncorroborated, inconclusive and secondhand testimony of former comrades was legal error, as the board had before it a legal presumption of death in the form of a decree from a Virginia state court, as well as the fact of his disappearance at the time and place of wartime hostilities.).

[308] *Vogelaar*, 665 F. Supp at 1306. The court found that when the government undertook to identify Private Barton's remains, it owed a duty to his mother to proceed with reasonable care; that the mother otherwise might suffer emotional distress was both foreseeable and likely.

2. ***The** Hostage Act*[309]—In 1986, family members of missing Vietnam service members joined Vietnam veterans in another lawsuit against the government. In *Smith v. Reagan,*[310] the plaintiffs first sought a writ of mandamus under the Hostage Act ordering the President to conduct foreign relations with various countries in Southeast Asia to pursue official inquiries about the status of Americans missing in action. The district court dismissed the mandamus count holding that the United States Constitution confers on the President the right to conduct foreign affairs and, therefore, the district court lacked subject matter jurisdiction to issue a writ of mandamus.[311] The plaintiffs next asked the district court to declare that the class of service members designated as missing in action were protected under the United States Constitution and laws.[312] On a government motion for summary judgment, the court refused to dismiss the plaintiffs request for declaratory judgment.[313]

In an interlocutory appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court decision and granted the government's request for summary judgment on this issue. The Fourth Circuit found that the plaintiffs were really asking the court to determine whether American service members remained in captivity in Southeast Asia and to assess the adequacy of the executive's efforts to obtain their release.[314] The Fourth Circuit refused to interfere, finding that it had "no rightful power and no compass."[315] Moreover, even if the issues raised were justiciable, the Fourth Circuit held that the suit must be dismissed because the Hostage

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309 **22** U.S.C. § 1732 (Supp. V 1993)states, in pertinent part:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forth-with to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release ....

310 637 **F.** Supp. 964 (E.D. N.C. 1986), ***reu'd,*** 844 F.2d 195 (4th Cir. 1988), cert. ***denied,*** 488 U.S. 954 (1988).

311 ***Id.*** at 966.

312 This last request for declaratory judgment again exemplifies the confusion over the term "missing in action." At the time plaintiffs filed their request for declaratory judgment asking the court to declare that those designated as missing in action enjoy the protections of the constitution and laws, there were no Vietnam-era service members who remained in a missing status or missing in action category under the Missing Persons Act.

313 *Smith,* 637 F. Supp. at 968.

314 Smith v. Reagan, 844 F.2d 195, 196 (4th Cir. 1988), cert. ***denied,*** 488 U.S. 954 (1988).

315 ***Id.*** at ***202.***

Act created no explicit private right of action.[316]

F. Release of Information on Unaccounted for Service Members

Throughout the 1980s, various individuals continued to make allegations of a government "cover-up" of this issue. These allegations were fueled by blockbuster movies about rescuing "forgotten" Vietnam prisoners of war and by profiteers claiming that, for a price, they could find a family member's loved one.[317] Congress investigated the question of a cover-up and, in 1984, the House Task Force on American Prisoners and Missing in Southeast Asia, chaired by Representative Gilman, announced that it found no government cover-up of information of live prisoners.[318] Additionally, in 1985, Senator John McCain felt compelled to denounce allegations of a cover-up from the Senate floor. Senator McCain conceded that "possibly not enough reporting has been followed up, and that perhaps not the correct procedures have been used in certain specific cases where there are live sightings and other reasons to believe that men are still alive." Senator McCain stated, however:

> I do reject . . . the allegations that there has been some kind of a cover-up on the part of this administration or previous administrations on this issue. There are too many men and women in uniform in the military who have been involved in this issue intimately, and I believe that such a thing as a cover-up is simply impossible.[319]

Fueling suspicions of a government cover-up, however, a 1986 Defense Intelligence Agency Task Force, chaired by General Eugene Tighe, concluded that there was "a strong possibility" that American prisoners of war were still alive and being held against their will in

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316 *Id.* at 200.

317 Alan Pell Crawford, *POW's/MIA's: What the Numbers Say*, THE VETERAN, April 1987, pt. 1 (a monthly newspaper of the Vietnam Veterans of America), *reprinted in* 133 CONG. REC. 21,222-25 (1987). Additionally, in the mid-1980s, Garwood again took center stage, insisting to *60 Minutes* Ed Bradley that Vietnam had "released' him only because he agreed to say that he had stayed in Vietnam voluntarily. Garwood also claimed that he was never debriefed on what he knew: that he saw American prisoners in Vietnam. Garwood's claims were suspect, however, because he had been interviewed several times shortly after his return in 1979, not only by the Defense Intelligence Agency, but also by the Marine Corps and by Congressmen Lester Wolff and Benjamin Gilman. *Id.* at 21,223. *See also* Alan Pell Crawford, *POW's/MIA's: What the Numbers Say*, THE VETERAN, May 1987, pt. 2, *reprinted in* 133 CONG. REC. 21,225-27 (1987) (citing to such cases as that of former Green Beret James G. 'Bo" Gritz, who convinced several people to give him thousands of dollars for a failed rescue mission and who claimed that multimillionaire H. Ross Perot would finance most of his efforts).

318 Crawford, *supra* note 317, May 1987, pt. 2, *reprinted in* 133 CONG. REC. 21,225 (1987).

319 131 CONG. REC. 19,621-22 (1985).

Vietnam.[320] Acknowledging the significance of the entire missing persons issue, in 1987 President Ronald Reagan appointed General John Vessey, Jr., former Chairman of the Joint Chiefs of Staff, as his Special Presidential Emissary for POW/MIA affairs.[321]

In 1988, Congress first recognized the importance of releasing all possible information on unaccounted for service members by enacting legislation incorporating into law government policy on disclosure of live-sighting reports of any person who was missing in action, a prisoner of war, or unaccounted for in Southeast Asia. This legislation required that the government make available to next of kin all such reports, or portions thereof, that had been correlated or possibly correlated to that person.[322]

In late 1990, members of the Senate Committee on Foreign Relations investigating the government's handling of the POWNIA matter issued a minority interim report. Although the minority report found no reason to believe that the majority of the findings of death were incorrect; the report stated, "staff review of live-sighting report files at the Defense Intelligence Agency found a disturbing pattern of arbitrary rejection of evidence that connected a sighting to a specific POW/MIA or United States POW/MIAs in general." The report concluded that "[t]he executive branch ha5 failed to address adequately the concerns of the family members of the POW/MIAs, and has profoundly mishandled the POWNIA problem."[323]

With this evidence and quoting from the Fourth Circuit holding in *Smith v. Reagan*[324] that "[alccountability [of United States

[320] SENATE POWiMIA AFFAIRS REPORT, *supra* note 15, at **515.** The Tighe Commission was chaired by General Eugene Tighe, Defense Intelligence Agency director from **1974** to **1981,** and assisted by Ross Perot and two former prisoners of war, Brigadier General Robbie Risner (USAF-Ret.) and Lieutenant General John Peter Flynn (USAF-Ret.). When questioned by Representative Solarz, Chairman of the House Foreign Affairs Committee's Subcommittee on Asian and Pacific Affairs, General Tighe stated that the task of his commission "was to find out whether there was [a cover-up], and we found no evidence whatsoever." Crawford, *supra* note **317,** May **1987,** pt. **2,** *reprinted in* **133** CONG. REC. **21,226 (1987).**

[321] General Vessey met several times with Vietnamese officials to discuss prisoner of war and missing in action issues. By **1988,** several Congressmen were calling for the restoration of normal diplomatic relations with Vietnam, including Senators John McCain, Alan Simpson, Larry Pressler, and Nancy Kassebaum. The Reagan administration continued to refuse to consider renewed ties, however, until Hanoi withdrew its forces from Cambodia and gave a full accounting of Americans unaccounted for from Vietnam. George Black, *Republican Overtures to Hanoi,* **THE** NATION, June **4, 1988,** at **773.**

[322] Intelligence Authorization Act, Fiscal Year **1989,** PUB. L. NO. **100-453, § 404, 102** Stat. **1904, 1908-09** (1988), *reprinted at* **50** U.S.C. **§ 401** (Supp. V 1993).

[323] Memorandum, U.S. Senate, Committee on Foreign Relations, subject: Interim Report by the Minority Staff of the Senate Committee on Foreign Relations on the U.S. Government's handling of the POW/MIA matter (Oct. **26,** 1990), *reprinted in* **137** CONC. REC. S3,438 (daily ed. Mar. **14, 1991).**

[324] **844** F.2d **195, 199** (4th Cir. 1988), *cert. denied,* **488** U.S. **954 (1988).**

POW/MIA's] lies in oversight by Congress or in criticism from the electorate, but not in the judgment of the courts," Senator Bob Smith submitted Senate Resolution 82. As a result of the resolution, the Senate established in 1991 the Select Committee on POW/MIA Affairs to review and assess United States policy concerning POWNIA issues.[325]

The government's handling of this issue was further criticized when, in a 12 February 1991 memorandum, Colonel Millard Peck, United States Army, resigned his assignment as the Chief of the Special Office for POWNIA, Defense Intelligence Agency. In his resignation, Colonel Peck stated that it was "a travesty" that national leaders continued to address the POW/MIA issue as the "highest national priority." In Colonel Peck's observation, the "principal government players were interested primarily in conducting a 'damage limitation exercise.'"[326]

At the same time, however, the government was making progress. On 20 April 1991, the Bush Administration announced that the United States had agreed to open a temporary office in Hanoi. The office's sole purpose was to investigate the fate of those still missing in Indochina.[327] This was the United States first official presence in Vietnam since the conflict ended.[328] By September 1991, the United States diplomatic initiatives with governments in

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325 S. Res. 82, 102d Cong., 1st Sess. (1991), *reprinted in* 137 CONG. REC. S3,436 (daily ed. Mar. 14, 1991) (Senator Smith submitted this resolution for himself and for Senators Grassley, Helms, Reid, Graham, Mack, Thurmond, Riegle, Specter, and Lautenberg). The members of the committee included: Senators John Kerry and Bob Smith, cochairmen; Tom Daschle; John McCain; Dennis Deconcini; Bob Kerrey; Harry Reid; Charles Robb; Bob Smith; Hank Brown; Charles Grassley; Nancy Kassebaum; and Jesse Helms. Also in 1991, Congress enacted legislation to assist the committee by requiring the Secretary of Defense to submit information on service members and civilian employees who remain unaccounted for as a result of military actions during World War II and the Korean Conflict. Intelligence Authorization Act, Fiscal Year 1992, PUB. L. No. 102-183, § 406, 105 Stat. 1260, 1268 (1991).

326 Memorandum, Colonel Millard A. Peck to Director, Defense Intelligence Agency, subject: Request for Relief (Feb. 12, 1991). Colonel Peck further requested that he be retired immediately from active military service "[s]o as to avoid the annoyance of being shipped off to some remote corner, out of sight and out of the way, in my own 'bamboo cage' of silence somewhere." Ronald Knecht, Special Assistant for Command, Control, Communications and Intelligence, Defense Intelligence Agency, headed a management review team of Colonel Peck's allegations in April 1991. The team found that Colonel Peck was not qualified as an intelligence manager and was "too close to the Vietnam POWiMIA issue to be objective." Moreover, the management team did not find any facts that supported Colonel Pecks allegations of impropriety in the POWiMIA resolution process. The report added that Colonel Peck had been warned several times by the Director, Defense Intelligence Agency, about his managerial shortcomings. SENATE POW/MIA AFFAIRS REPORT, *supra* note 15, at 175.

327 *Vietnam and America: Toehold in Hanoi*, THE ECONOMIST, Apr. 27, 1991, at 42.

328 From 1992 to 1994, Joint Task Force-Full Accounting investigated and excavated cases involving more than 1700 unaccounted for Americans in Vietnam, Laos, and Cambodia. Cliff Gromer, *A Full Accounting; Our Government Brings High Tech to Bear in the Search for Vietnam War MIAs*, POPULAR MECHANICS, Sept. 1994, at 41.

Indochina had significantly improved access to information that might account for American personnel from Southeast Asia.[329] Consequently, the Secretary of Defense established within the Office of the Assistant Secretary of Defense for International Security Affairs the position of Deputy Assistant Secretary of Defense for POW/MIA Affairs. This office had primary responsibility for developing and coordinating policy on accounting for personnel.[330] Later, the Department of Defense published regulations specifically authorizing the Director, Defense POW/MIA Office (DPMO) to communicate directly with other government officials, representatives of the legislative branch, members of the public, and representatives of foreign governments in carrying out assigned functions.[331]

Also in 1991, Congress enacted legislation expanding the 1988 law requiring disclosure of certain information on unaccounted for service members.[332] The new law required the Secretary of Defense to make available to the public all records within his control regarding live-sighting reports, or other information, relating to the location, treatment, or condition of any Vietnam-era service member who was ever carried in a prisoner of war or missing in action status.[333]

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329 Memorandum, Deputy Secretary of Defense to Under Secretary of Defense for Policy, Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, Assistant Secretary of Defense for Public Affairs and Director of Administration and Management, subject: Policy Organization for POWiMIA Affairs (Sept. 17, 1991).

330 *Id.*

331 32 C.F.R. § 371.7 (1995). In 1993, the Department of Defense published regulations outlining the mission, responsibilities and functions of the Defense Prisoner of War/Missing in Action Office (DPMO). *Id.* I 371. Those regulations provide that this office was to provide centralized management of this issue within the Department of Defense. *Id.* § 371.3. Among other things, the Director, DPMO, has the responsibility and authority to serve as the Department of Defense focal point for POW/MIA matters, to provide Department of Defense participation in the conduct of negotiations with officials of foreign governments, and to provide representation to established POW/MIA-related interagency forum. ***Id.* § 371.5.**

332 ***See supra*** note 322 and accompanying text for a discussion of the 1988 legislation.

333 National Defense Authorization Act for Fiscal Years 1992 and 1993, PUB. L. No. 102-190, § 1082, 105 Stat. 1335, 1480 (1991), ***reprinted at*** 50 U.S.C. § 401 (Supp. V 1993) [hereinafter NDAAfor FYs 1992 to 19931.

> (a) Public Availability of Information. (1) Except as provided in subsection (b), the Secretary of Defense shall, with respect to any information referred to in paragraph (2), place the information in a suitable library-like location within a facility within the National Capital region for public review and photocopying.
>
> (2)(A) Paragraph (1) applies to any record, live-sighting report or other information in the custody of the Department of Defense that relates to the location, treatment, or condition of any Vietnam-era POW/MIA on or after the date on which the Vietnam-era POWiMIA passed from United States control into a status classified as a prisoner of war or missing in action, as the case may be, until that individual is returned to United States control.

The 1991 law required all other agencies and departments of the federal government that receive such information to provide it to the

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(B) For purposes of this section, a Vietnam-era POWiMIA is any member of the Armed Forces or civilian employee of the United States who was at any time classified as a prisoner of war or missing in action during the Vietnam era and whose person or remains have not been returned to United States control.

(b) Exceptions. (1) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection (a) if—

(A) the record or other information is exempt from the disclosure requirements of section 552 of title 5, United States Code, by reason of subsection (b) of that section; or

(B) the record or other information is in a system of records exempt from the requirements of subsection (d) of section 552a of such title pursuant to subsection (j) or (k) of that section.

(2) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection (a) if the record or other information specifically mentions a person by name unless—

(A) in the case of a person who is alive (and not incapacitated) and whose whereabouts are known, that person expressly consents in writing to the disclosure of the record or other information; or

(B) in the case of a person who is dead or incapacitated or whose whereabouts are unknown, a family member or family members of that person determined by the Secretary of Defense to be appropriate for such purpose expressly consent in writing to the disclosure of the record or other information.

(3)(A) The limitation on disclosure in paragraph (2) does not apply in the case of a person who is dead or incapacitated or whose whereabouts are unknown if the family members or members of that person determine pursuant to subparagraph (B) of that paragraph cannot be located after reasonable effort [*].

(B) Paragraph (2) does not apply to the access of an adult member of the family of a person to any record or information to the extent that the record or other information relates to that person.

(C) The authority of a person to consent to disclosure of a record or other information for the purposes of paragraph (2) may be delegated to another person or an organization only by means of an express legal power of attorney granted by the person authorized by that paragraph to consent to the disclosure.

(c) Deadlines. (1) In the case of records or other information that are required by subsection (a) to be made available to the public and that are in the custody of the Department of Defense on the date of the enactment of this Act [December 5, 19911, the Secretary shall make such records and other information available to the public pursuant to this section not later than three years after that date.[**] Such records or other information shall be made available as soon as a review carried out for the purposes of subsection (b) is completed.

(2) Whenever after March 1, 1992, a department or agency of the Federal Government receives any record or other information referred to in subsection (a) that is required by this section to be made available to the public, the head of that department or agency shall ensure that such record or other information is provided to the Secretary of Defense, and the Secretary shall make such record or other information available in accordance with subsection (a) as soon as possible and, in any event, not later than one year after the date on which the record or information is received by the department or agency of the Federal Government.

Secretary of Defense, who must then make the records available.[334]

Building on these disclosure laws, in 1992 the Senate passed a resolution unanimously requesting the President to issue an executive order "requiring all executive branch departments and agencies to declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POWs and MIA's."[335] President George Bush immediately issued the executive order, dated 22 July 1992, requiring the declassification of all such materials on Americans who became prisoners of war or missing in action in Southeast Asia.[336]

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(3) If the Secretary of Defense determines that the disclosure of any record or other information referred to in subsection (a) by the date required by paragraph (1) or (2) may compromise the safety of a Vietnam-era POW/MIA who may still be alive in Southeast Asia, then the Secretary may withhold that record or other information from the disclosure otherwise required by this section. Whenever the Secretary makes a determination under the preceding sentence, the Secretary shall immediately notify the President and the Congress of that determination.

(d) Definition. For purposes of this section, the term 'Vietnam era" has the meaning given that term in section 101 of title 38, United States Code.

Id.

* NDAA for FY96, ***supra*** note 23, § 1085(1), amended this provision by striking out "cannot be located after a reasonable effort." and inserting in lieu thereof the following:

cannot be located by the Secretary of Defense—

(i) in the case of a person missing from the Vietnam era, after a reasonable effort; and

(ii) in the case of a person missing from the Korean Conflict or Cold War, after a period of 90 days from the date on which any record or other information referred to in paragraph (2) is received by the Department of Defense for disclosure review from the Archivist of the United States, the Library of Congress, or the Joint United States-Russian Commission on POW/MIAs.

** National Defense Authorization Act for Fiscal Year 1995, PUB. L. No. 103-337, § 1036, 108 Stat. 2663 (1994) extended the deadline to make the information available to 30 September 1995; NDAA for FY96, ***supra*** note 23, § 1085(2), extended this deadline to 2 January 1996. The Department of Defense reported that under this law, it had declassified some 670,000 pages of Vietnam-era POW/MIA documents in 1992 alone. 140 CONG. REC. S7,539 (daily ed. June 23, 1994) (statement of Sen. Smith).

334 NDAA for FYs 1992 to 1993, ***supra*** note 333, § 1082(c)(2). The law provides three exceptions to its disclosure requirements. It does not require disclosure of information exempt under the Privacy Act, 5 U.S.C. § 552(b) (1988), or the Freedom of Information Act, 5 U.S.C. § 552a(j), (k) (1988). Additionally, the law does not require disclosure if the record specifically mentions a person by name unless the person expressly consents in writing to disclosure. However, the law allows access to these records, as an exception, by an adult member of the family of the missing person. *Id.* § 1082(b).

335 S. Res. 324, 102d Cong., 2d Sess. (1992), ***reprinted in*** 138 CONG. REC. S9,664 (daily ed. July 2, 1992).

336 Exec. Order No. 12812, July 22, 1992, 3 C.F.R. § 311 (1992 Comp.). On Memorial Day, 1993, President Bill Clinton pledged that the government would declassify virtually all documents related to individuals held as prisoners of war or missing in action by Veteran's Day. On Veteran's Day, November 11, 1993, President Clinton announced that the government had declassified all relevant documents that it could. President's Remarks at a Veterans Day Breakfast, 29 WEEKLY COMP. PRES. DOC. 2323 (Nov. 11, 1993).

Also during 1992, the Select Committee on POW/MIA Affairs, cochaired by Senators John Kerry and Bob Smith, continued its investigation, including the taking of testimony by former Secretary of State Henry Kissinger and a written statement from former President Richard Nixon.[337] Finally, in January 1993, the select committee published its final report finding "no compelling evidence" that any American service member is currently being held in Southeast Asia.[338] Moreover, the committee found no evidence that officials or investigators from the Defense Intelligence Agency ever concealed information concerning the possible presence of live Americans in Southeast Asia.[339] The committee found, however, that the failure of the executive branch to establish and maintain a consistent, sustainable set of categories and criteria for the status of missing Americans both during and after the war "contributed substantially to public confusion and mistrust." The committee noted that during the Vietnam Conflict a number of persons listed as prisoner of war by the Defense Intelligence Agency were listed as missing in action by the Military Services. Later, the question of how many Americans were truly unaccounted for was confused by the Department of Defense's decision to include those initially classified as KIA/BNR in its listings of those unaccounted for in Southeast Asia.[340]

During the early 1990s, the government also intensified efforts to account for service members from the Second World War, the Korean Conflict, and the Cold War Era. The Bush Administration, for example, established a joint commission with Russia to investigate unresolved cases of prisoners of war and those missing in action from World War II.[341] Additionally, in October 1991, the United States and North Korea entered into an agreement on the repatriation of the remains of United States personnel from the Korean Conflict.[342] In 1994, Senator Bob Smith, on behalf of himself and several other senators, introduced legislation on unaccounted for service members from Korea, Vietnam, and the Cold War Era. As enacted, the law amended the 1991 disclosure laws by requiring the Secretary of Defense to make available records within his control

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337 *See* testimony of Dr. Kissinger and Memorandum, Richard Nixon to Select Committee on POWiMIA Affairs In Response to the Committee's Questions of December 18, 1992 (Dec. **30,** 1992), *reprinted in* 139 CONG. REC. S1,214-18 (daily ed. Feb. 3, 1993).

338 SENATE POW/MIA AFFAIRS REPORT, *supra* note 15, at 9.

339 *Id.* at 15-16.

340 *Id.* at 17.

341 Statement by Press Secretary Fitzwater on the Russia-United States Commission on Prisoners of War and Missing in Action, 28 WEEKLY COMP. PRES. Doc. 517 (Mar. **20,** 1992).

342 National Defense Authorization Act for Fiscal Year 1995, PUB. L. NO. 103-337, § 1035(a)(3), 108 Stat. 2663 (1994) [hereinafter NDAA for FY95].

regarding live-sighting reports and other information on service members from the Korean Conflict, the Cold War Era, and the Vietnam Conflict.[343]

The law also required the Secretary of Defense to designate an official of the Department of Defense to serve as a single point of contact for immediate family members of any unaccounted for POWiMIA from the Korean Conflict and the Cold War Era.[344] The law required the official to assist these individuals in searching for information. Two provisions of the law addressed establishing contact with other countries to account for service members from the Korean Conflict. The first contained the "sense of Congress" that the Secretary of Defense should establish contact with officials of the Chinese Ministry of Defense regarding unresolved issues on American prisoners of war and those missing in action from the Korean Conflict.[345] The second required the President to give serious consideration to establishing a joint working-level commission with North Korea.[346]

The law also required the Secretary of Defense to submit to Congress a by-name listing of all personnel about whom officials of the Socialist Republic of Vietnam might be able to produce additional information or remains that could lead to accounting for those personnel.[347] On 13 November 1995, the Department of Defense presented to Congress a comprehensive review of all cases involving unaccounted for Americans in Southeast Asia. As of November 1995, there were 2162 Americans still unaccounted for in Southeast Asia: 1613 in

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343 *Id.* § 1036 (amending NDAA for FYs 1992-93, *supra* note 333, § 1082). The law defines "Cold War" to mean the period from the end of World War II to the beginning of the Korean conflict and the period from the end of the Korean conflict to the beginning of the Vietnam era. *Id.* § 1036(d)(2).

344 *Id.* § 1031. The term "unaccounted-for Korean conflict POWIMIA" means a member of the armed forces or civilian employee of the United States who, as a result of service during the Korean conflict, was at any time classified as a POW or MIA and remains unaccounted for. *Id.* § 1031(e)(1). The term "unaccounted-for Cold War POW/MIA" means the same personnel as above who, as a result of service during the period from September 2, 1945, to August 21, 1991, was at any time classified as a POW or MIA and who remains unaccounted for. *Id.* § 1031(e)(2). There are 130 individuals unaccounted for as a result of Cold War incidents. 140 CONG. REC. S7,539 (daily ed. June 23, 1994)(statement of Sen. Smith).

345 NDAA for FY95, *supra* note 342, § 1033. The legislation explained that this "sense of Congress" was the result of a failure by the Departments of State and Defense to implement the Senate Select Committee on POW/MIA Affairs recommendation that they form a POW/MIA task force on China similar to Task Force Russia. *Id.* § 1033(b).

346 *Id.* § 1035(c). Congress also based this provision of the law on recommendations from the Senate Select Committee on POW/MIA Affairs. The committee had recommended that the Departments of State and Defense take immediate steps to form a commission with North Korea through the United Nations Command, and that the President establish a joint working level commission with North Korea. *Id.* § 1035(a).

347 *Id.* § 1034.

Vietnam, 464 in Laos, 77 in Cambodia, and 8 in China.[348] None of these individuals, however, are in a missing status, such as missing in action or prisoner of war, under the Missing Persons Act.[349]

Finally, the law required the Department of Defense to review the provisions of the Missing Persons Act in consultation with the Service Secretaries. Within 180 days after enactment, the law required the Secretary of Defense to report to Congress with recommendations as to whether those provisions of law should be amended.[350] In June 1995, the Department of Defense presented its recommendations to Congress.[351] First, the Department of Defense recommended that the Missing Persons Act be amended to codify procedural protections required by the *McDonald* decision.[352] These protections-extended to the missing person's next-of-kin who receive benefits under the Missing Persons Act—include notice and a reasonable opportunity to attend the review with privately retained attorney, reasonable access to the information on which the review is based, and the opportunity to present any information that they consider relevant at the hearing. Also, the Department of Defense recommended that the Missing Persons Act be amended to delete the phrase "or a lapse of time without information" from the provi-

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348 *Hearing of the Military Personnel Subcommittee of the House National Security Committee on Government's Knowledge of POWs and MIAs,* 104th Cong., 1st Sess. (1995) (testimony of General James Wold, Director, Defense POWNIA Office), *available in* LEXIS, Nexis Library, Federal News Service (Nov. 30, 1995). General Wold testified that the Comprehensive Study placed each unaccounted service member into one of three categories: (1) those where the Department of Defense has specific next steps to pursue in the investigation process; (2) cases where the Department of Defense has exhausted all current leads; and (3) the cases of 567 individuals where no action by any government will result in the recovery of remains (such as cases where aircraft were downed at sea).

349 On 19 September 1994, on the request of his family, the Secretary of the Air Force made a finding of death under the Missing Persons Act in the case of Colonel Charles Shelton, the last Vietnam-era veteran to be carried in a missing status, prisoner of war category. Telephone Interview with Mr. Barney Frampton, Missing Persons Division, HQ, AFMPC/DPMCB, Department of the Air Force, Randolph Air Force Base, Texas (Feb. 9, 1996). *See also* Dina Elboghdady & Jeff Kramer, *Dornan Rule Requires Evidence Before MIAs can be Called Dead,* ORANGE COUNTY REGISTER, Mar. 15, 1996, at A1 (reporting that Colonel Shelton's five children asked that the Air Force declare Colonel Shelton dead after his wife committed suicide).

350 NDAA for FY95, *supra* note 342, § 1032. The report was due to Congress on 5 April 1995 (180 days from the date of enactment of the law on 5 October 1994).

351 *Department of Defense Report on the Review of Chapter 10, Title* **37,** *United States Code,* attached as an enclosure to a letter from Secretary of Defense William Perry to The Honorable Strom Thurmond, Chairman, Committee on Armed Services, United States Senate, Washington, D.C. (undated) (on file with the Defense Prisoner of War/Missing in Action Office, Department of Defense) [hereinafter Department of Defense Report].

352 McDonald v. McLucas, 371 F. Supp. 831 (S.D. N.Y. 1974) (three-judge court), *aff'd mem.,* 419 U.S. 297 (1974).

sion on when the Service Secretary may make a finding of death.[353] Thus, the Department of Defense proposed that the Missing Persons Act authorize the Service Secretary to make a finding of death only when the Secretary "considers that the United States Government has made reasonable efforts to obtain sufficient data to warrant a finding of death, and that existing information establishes a reasonable presumption that a member in a missing status is dead."[354]

During this time, relations with Hanoi were warming. In February 1994, President Clinton announced that the United States

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353 *See* 37 U.S.C. § 556(b) (1988) (providing that the Service Secretary may make a finding of death "when he considers that information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead").

354 Department of Defense Report, *supra* note 351, at 2. The Department of Defense proposed to delete the language referring to a "lapse of time without information" because, as the Department explained, while never the policy of the Department of Defense, this section had been interpreted by some outside the Department of Defense as authorizing the Service Secretaries to declare a person dead primarily on the basis of a passage of time. *Id.* The Department of Defense also recommended amendment of the Act to authorize the Secretary concerned to remove members who are voluntarily absent from a missing status designation. *Id.* at 4.

On 31 October 1995, Senator Smith took to the Senate floor, denouncing the Department of Defense for being unresponsive to the requirements of the law as contained in the NDAA for FY95. *Supra* note 342, §§ 1031-36. Senator Smith complained that the Department of Defense had not submitted its recommendations on changing the Missing Persons Act at the end of the 180-day period required by the law, that is, on 5 April 1995. *Id.* § 1032. According to Senator Smith, Congress received the report at the end of June, two months late, and "[i]t was obvious the Department of Defense made no serious attempts to consult with Members of Congress before submitting what turned out to be an inadequate report." Senator Smith also presented a letter from the President of the Korean/Cold War Family Association complaining that the Department of Defense "single point of contact" required by the law was not able to follow through on requests for information. *Id.* § 1031. Senator Smith further stated that the Secretary of Defense had visited Beijing just three weeks after the President had signed into law the provision urging the Secretary of Defense to establish contact with officials of the Communist Chinese Minister of Defense on Korean War American POWs and MIAs. *Id.* § 1033. The Secretary did not, according to Senator Smith, even broach the subject with Chinese officials. Senator Smith heatedly complained that the Department of Defense had, after 10 months, not been able to produce the by-name listing of all Vietnam-era POWiMIA cases where it is possible that Vietnamese or Lao officials can produce additional information, a list the law required to be produced by 17 November 1994 (45 days from the date of its enactment on October 5, 1994). *Id.* § 1034. (The Department of Defense finally forwarded the list to Congress in November 1995, see *supra* note 348 and accompanying text.) Senator Smith conceded that the Department of Defense had made headway in its efforts to obtain information from North Korea on POW/MIAs. Nevertheless, he complained that the President had not formed a special commission with the North Koreans to resolve the issue, as urged by the law. *Id.* § 1035. Finally, as to the requirement to disclose all Department of Defense records on American POW/MIAs from the Korean and Cold Wars in the possession of the National Archives by 30 September 1995, Senator Smith complained that the administration had not met the deadline and had requested a three-month extension. *Id.* § 1036. (Congress did extend this deadline to 2 January 1996 in the NDAA for FY96, *supra* note 23, § 1085(2)). 141 CONG. REC. S16,404-19 (daily ed. Oct. 31, 1995) (statement of Sen. Smith).

was lifting the trade embargo against Vietnam and establishing a liaison office in Hanoi. President Clinton said this step offered the best way to achieve a full accounting of Americans unaccounted for in Southeast Asia.[355] Then, on 11 July 1995, President Clinton announced the normalization of diplomatic relations with Vietnam.[356]

Today, the United States government continues its search to account for service members. A Presidential delegation, headed by Hershel Gober, Deputy Secretary of Veterans Affairs, has met with officials from Hanoi on at least three occasions.[357] Members of the United States-Russian Joint Commission also continue to search for remains of service members possibly held in the Soviet Union during the Korean Conflict.[358] In early 1996, however, the outlook was not promising with North Korea. In January, talks with the North Koreans collapsed. Then, on 20 January 1996, North Korea dissolved an excavation team assigned to the task, accusing Washington of not paying enough money for the remains of United States service members.[359]

The government also continues its efforts to release information on unaccounted for service members. For example, the Library of Congress has made available on the internet bibliographic records of government documents on prisoners of war and those missing in action in Southeast Asia. Also available on-line are several files containing papers from the United States-Russia Joint Commission on

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355 President's Remarks Announcing the End of the Trade Embargo on Vietnam and an Exchange with Reporters, 30 WEEKLY COMP. PRES. DOC. 205 (Feb. 3, 1994). The majority of the Senate approved of this action, as reflected in its "sense of Senate on relations with Vietnam," Act of April 30, 1994, PUB. L. NO. 103-236, § 521, 108 Stat. 382 (1994). This "sense of Senate" reveals that the majority of Senators believed the government was committed "to seeking the fullest possible accounting" of unaccounted for servicemen from Southeast Asia. In addition, a majority thought that the government of Vietnam had increased its cooperation and that "substantial and tangible progress had been made" in the accounting process. Further, the Senate noted that United States senior military commanders and personnel working in the field to account for POW/MIAs believed that lifting the embargo against Vietnam would "facilitate and accelerate the accounting efforts."

356 President's Remarks Announcing the Normalization of Diplomatic Relations with Vietnam, 31 WEEKLY COMP. PRES. Doc. 1,217 (July 11, 1995).

357 *Hearing of the Military Personnel Subcommittee of the House National Security Committee on Government's Knowledge of POWs and MIAs,* **104th** Cong., 1st Sess. (1995) (testimony of Hershel W. Gober, Deputy Secretary of Veterans Affairs, Department of Veterans Affairs), *available in* LEXIS, Nexis Library, Federal Document Clearing House Congressional Testimony (Dec. 14, 1995).

358 Vladimir Isachenkov, *AP* (Aug. **30,** 1995), *available in* LEXIS, Nexis Library, *AP* File. According to this article, a former Soviet soldier testified in 1995 before that commission that he met four American POWs in 1951 in the Soviet Union.

359 *See North Korea to Halt Excavation of U.S. War Dead,* L.A. Times, Jan. 21, 1996, at **A9** (quoting General James Wold, Director, Defense POW/MIA Office, that Washington offered more than $1 million for the 162 remains returned in 1993-94; North Korea reportedly demanded $4 million).

POWs/MIAs.[360]

The stories, however, also continue. On 15 January 1996, a South Korean newspaper cited an unnamed South Korean official as saying that the United States had confirmed that it believes about ten American service members are still held by the North Koreans. As proof, the paper published a photograph of one of the alleged service members. At the same time, footage from an early 1980s North Korean movie surfaced, appearing to show two Caucasians whom the paper claimed were American service members. Again, hopes were raised. The Pentagon denied the reports that American service members were still being held by North Korea. The Americans turned out to be four service members who deserted their units in South Korea in the 1960s.[361]

Not so easily dismissed is the more recent case of former Army Master Sergeant Mateo Sabog. In March 1996, Mr. Sabog, missing from Vietnam and presumed dead, walked into a Social Security Administration office in Georgia and filed for benefits. The Army last saw Master Sergeant Sabog in Saigon in February 1970 preparing to leave the country after serving his second tour of duty in Vietnam. Initially, the Army listed Sabog as a deserter. In 1979, at the request of his family, however, an Army board decided that a mistake had been made and Sabog should be considered missing in action and presumed dead. Additionally, in 1993, Sabog's name was added to the Vietnam Veterans Memorial.[362] In April 1995, the Defense POW/MIA Action Office informed Sabog's brother that the Vietnam government had indicated that Sabog's remains had been recovered. The remains included teeth, which the Army was attempting to positively identify through DNA analysis when Sabog turned up in Georgia.[363] The Army is not, however, treating Sabog's return as a criminal matter. An investigation revealed that Sabog, who had twenty-four years of active service when he disappeared, had made it back to the United States in 1970 but simply vanished.

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360 *Library of Congress Adds POWIMIA Documents Index to Internet,* INFORMATION TODAY, Jan. 1995, at 41. *See also Library of Congress puts POWIMIA Documents Index on Internet,* ONLINE, Mar. 1995, at 10 (providing that the information is available in a demonstration file on the Internet via the Library's World-Wide Web server at http://lcweb.loc.gov.).

361 *Pentagon Names 4 GIs Who Defected to North Korea,* L.A. TIMES, Jan. 17, 1996, at A4. *See also Pentagon Identifies 4 Defectors,* THE DAYTON DAILY NEWS, Jan. 17, 1996, at A5 (reporting that the Pentagon had identified the four as Private Larry Abshier, Corporal Jerry Parrish, Private James Dresnok, and Sergeant Robert Jenkins; all four defected from 1962-1965).

362 Ron Martz & Rebecca McCarthy, *Back from the "Dead": A Military Mystery,* ATLANTA J. AND CONST., Mar. 9, 1996, at A1.

363 *"Dead" Soldier Is Alive, AP,* Mar. 7, 1996, *available in* LEXIS, Nexis Library, AP File.

As an Army spokesperson stated, "this is not another Bobby Garwood situation."[364]

Are there other Mateo Sabogs out there? Are there service members from Vietnam who, for whatever reason, never made it back to their families and who were presumed dead by their country? Some will no doubt argue that Sabog's return affirms the need for the new law because the Army's accounting procedures obviously were inadequate.[365] This argument, however, fails to consider the Military Services' procedures on accounting for service members when Congress enacted the new law. These procedures, and not those in effect during past conflicts, must be examined before deciding whether Service policies are inadequate to determine the status of missing Department of Defense personnel.

V. Current Department of Defense Procedures on Accounting for Missing Persons

As discussed, although Congress never intended the Missing Persons Act to be a law to account for missing persons,[366] a review of the Department of Defense policy and implementing Service regulations reveals that the Military Services have broadened the Missing Persons Act's requirements and have created a system for personnel accounting. Indeed, current Service regulations contain systems for determining the status of missing persons similar to the new law.

A. *Department of Defense Policy*

Department of Defense policy requires that the Military Services provide a full and accurate accounting of personnel in a missing status "to the most realistic extent possible."[367] To further

[364] *See* Susan Katz Keating, *Listed on Vietnam Memorial, Former Soldier Files for Benefits*, WASH. TIMES, Mar. 7, 1996, at A6 (quoting Army spokesperson Major Anda Strauss).

[365] *See, e.g.*, Nancy West, *Smith: Vet's Rise Proves MIA Point*, NEW HAMPSHIRE SUNDAY NEWS, Mar. 24, 1996, at A1 (quoting from a letter forwarded to the newspaper from Senator Bob Smith claiming that the case of Mateo Sabog demonstrates how quick the Clinton Administration has been to "'resolve' MIA cases in a desperate attempt to justify full normalization of relations between Hanoi and Washington before the truth is finally known about our missing personnel"); Martz, *supra* note 262 (quoting Ms. Dolores Alfond, head of the National Alliance of Families of POWs and MIAs, who stated that the return of Sabog "shows the Pentagon had no idea who is really dead . . . [i]t also shows they are declaring people dead just to get the numbers off the books").

[366] *See supra* pt. III.B (discussing the purpose of the Missing Persons Act).

[367] DEP'T OF DEFENSE, INSTRUCTION 1300.18, MILITARY PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES, para. D.2. (Dec. 27, 1991) [hereinafter DODI 1300.181. The Department of Defense defines the various missing status categories as follows:

this policy, the Department of Defense gives instructions to the Military Services on placing a service member in a missing status. Prior to the new law, however, the Department of Defense did not provide written guidance on status review hearings.[368]

First, when a commander suspects that a person may be missing, the Department of Defense requires that the Services place the person in an interim status called "Duty Status-Whereabouts Unknown," or "DUSTWUN."[369] The Services must use the DUSTWUN status when a commander suspects that a person's absence is involuntary but insufficient evidence prevents deciding whether the

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Missing. A casualty status applicable to a person who is not at his or her duty location due to apparent involuntary reasons and whose location may or may not be known. Chapter **10** of **37** U.S.C. . . . provides statutory guidance concerning missing members of the Military services. Excluded are personnel who are AWOL, deserter, or dropped-from-rolls status. A person declared missing is further categorized as follows:

a. Beleaguered. The casualty is a member of an organized element that has been surrounded by a hostile force to prevent escape of its members.

b. Besieged. The casualty is a member of an organized element that has been surrounded by a hostile force for the purpose compelling it to surrender.

c. Captured. The casualty has been seized as the result of action of an unfriendly military or paramilitary force in a foreign country.

d. Detained. The casualty is prevented from proceeding or is restrained in custody for alleged violation of international law or other reason claimed by the government or group under which the person is being held.

e. Interned. The casualty is definitely known to have been taken into custody of a nonbelligerent foreign power as the result of and for reasons arising out of any armed conflict in which the Armed Forces of the United States are engaged.

f. Missing. The casualty is not present at his or her duty location due to apparent involuntary reasons and whose location is unknown.

g. Missing in Action (MIA) The casualty is a hostile casualty, other than the victim of a terrorist activity, who is not present at his or her duty location due to apparent involuntary reason and whose location is unknown.

Id. encl. **2,** para. **24.**

368 In **1974,** representatives of the Department of Defense and the Military Services agreed on status review procedures required to implement the decision in McDonald v. McLucas, **371** F. Supp. **831** (S.D. N.Y. **1974)** (three-judge court), *aff'd mem.,* **419** U.S. **987 (1974).** Although the Department of Defense ultimately approved the Services' procedures, it did not issue implementing guidance. ***See*** OGC Memorandum for Record, *supra* note **235,** and accompanying text (summarizing the agreement).

369 ***See*** DODI **1300.18,** *supra* note **367,** encl. **2,** para. **7** (defining "casualty status" as a term used to classify a casualty for reporting purposes). According to Department of Defense policy, there are seven casualty categories: Deceased, DUSTWUN, Missing, Very Seriously I11 or Injured (VSI), Seriously Ill or Injured (SI), Incapacitating Illness or injury (III), and Not Seriously Injured (NSI)). *Id.*

person is missing or dead.[370] This status "is useful during armed conflict when hostilities prevent an immediate capability to determine the member's true status or search and rescue efforts are ongoing to determine the member's true status."[371] Normally, the Services may retain a person in a DUSTWUN casualty status for a maximum of ten days, as this time is "usually sufficient" to investigate the circumstances of the absence.[372]

Second, the Department of Defense requires the Military Services to appoint a casualty assistance representative in cases of missing service members. This representative maintains contact with the next of kin to keep them informed on all matters relating to the case until it has been resolved and all entitlements and benefits are received. The representative also provides points of contact for information regarding investigations and other government agencies that may be involved in the missing service member's case.[373]

Third, the Department of Defense provides instruction on release of information about the person. The Military Service must furnish the next of kin information on the circumstances surrounding the incident and keep them informed as additional information becomes available. The Military Service also must make every effort to declassify information in cases where a member is declared deceased or missing.[374] The information released to the public is limited to basic biographical information, except under two conditions: (1) a court-appointed legal guardian may give written consent for release of information to a third party and (2) information subject to FOIA must be released.[375] If the FOIA is invoked, the Service must release the information unless it qualifies for an exemption. The two exemptions that apply most often are the national security

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370 *Id.* para. F.2.a.

371 *Id.*

372 *Id.* para. F.2.b.

373 *Id.* para. F.1.b.(1). The Department of Defense policy also provides guidance on notifying next of kin that an individual is in a missing status. Ordinarily, a uniformed representative of the military Service must make an initial notification. in person, to the primary next of kin. If a casualty results from either a hostile action or terrorist activity, the initial notification also must be made in person to parents who are the secondary next of kin. Additionally, the policy provides that the member's wishes, expressed in either the record of emergency data or by the member at the time of the casualty, concerning whom not to notify must be honored, unless the commander decides that official notification should be made. *Id.* para. F.1.a.

374 *Id.* para. F.1.b.(4). Further, in cases where a person disappears during a classified operation, the Military Service must provide all unclassified information to the next of kin. *Id.*

375 *Id.* para. F.3.c.

exemption and the personal privacy exemption.[376]

B. Military Services' Policies Placing a Person in a Missing Status

As mandated by Department of Defense policy, the Military Services require the appropriate authority to place a person in a DUSTWUN status when a person's whereabouts are unknown and the absence may be involuntary. Similar to the new law, once in a DUSTWUN status, the Services require an investigation prior to placing an absent person in a missing status. Because the Department of Defense provides no procedures on investigating the whereabouts of absent persons, each Service has promulgated its own investigative procedures.

1. Army Procedures[377]—The Army's policy requires the first commander in the chain of command to initiate an immediate investigation when a soldier's whereabouts are unknown. If, after twenty-four hours, the soldier's status is still unknown and is believed to be involuntary, the Casualty Area Commander (CAC), in coordination with the Commander, United States Army Personnel Command (CDR, PERSCOM), must designate the soldier as DUSTWUN.[378] Next, the first lieutenant colonel level commander in the soldier's chain of command must initiate an informal investigation.[379] By the seventh day, the CAC must forward the results of the investigation to the CDR, PERSCOM, with a recommendation that the soldier be declared missing, dead, or absent without leave.[380] On receipt of the CAC's recommendation, the CDR, PERSCOM, appoints a hearing officer in the grade of major or above to review the findings and recommend an appropriate duty status.[381] The CDR, PERSCOM, as designee of the Secretary of the Army, then makes a decision as to

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376 *Id.* para. F.3.a. (citing 5 U.S.C. § 552(b)(1), (b)(6) (1988). In determining whether information should be released under FOIA, Department of Defense policy is to use a balancing test, weighing the public interest in disclosure against the potential invasion of personal privacy. In addition, Department of Defense policy instructs that the privacy of family members "should be considered as a clear and present factor that weighs against the public release of information." *Id.* para. F.3.c.

377 DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994) [hereinafter AR 600-8-11. The policy provides that it is an implementation of the Missing Persons Act, and cites to the congressional purpose of the Act "to alleviate financial hardship suffered by family members of persons determined to be in one of the missing categories." *Id.* para. 8-1a.

378 *Id.* para. 8-1b. The CAC is a commander who has casualty reporting responsibilities to the United States Total Army Personnel Command Casualty Operations Center. The CAC is responsible for the area in which the casualty occurs or the area in which the next of kin resides. *Id.* app. C, § 111, Terms.

379 *See* DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988)(Outlining the informal procedures to be used by the commander).

380 *AR* 600-8-1, ***supra*** note 377, para. 8-8b.

381 *Id.* para. 8-9a.

the soldier's status.[382]

If the CDR, PERSCOM, decides that a soldier should be placed in a missing status, the soldier's general court-martial convening authority (GCMCA) must convene a board of inquiry.[383] The board develops all facts surrounding the disappearance384 and recommends that the soldier be finally declared missing, dead, absent without leave, or returned to military control.[385] By day forty-five, the GCMCA must forward the report to the CDR, PERSCOM, who then makes a final determination of status.[386]

2. *Navy Procedures*[387]—The Navy requires that a commander must immediately report to the Commander, Naval Military Personnel Command (CDR, NAVMILPERS), that a sailor may be missing.[388] The command also must submit a personnel casualty report no later than four hours following receipt of information that a sailor may be missing. This report contains a detailed description of the circumstances that led to the sailor's disappearance.[389] Thereafter, the command must submit daily supplemental search reports, stating the progress of the search and any other pertinent information, to keep next of kin informed.[390]

If, after the immediate search, the sailor's command believes conclusive evidence of death exists, the command "has the authority and duty to submit a report of death."[391] "Conclusive evidence of death may be considered to exist when information . . . overcomes beyond any reasonable doubt or logical possibility that a missing person may have survived," but is not limited to the recovery of remains.[392] If conclusive evidence of death does not exist, the command must decide whether the sailor's status is unauthorized. If not

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382 *Id.* para. 8-9b.

383 **Id.** para. 8-12a. **A** single board may consider the status of all persons involved in the same incident. Additionally, if no GCMCA exists, the commander reporting directly to CDR, PERSCOM, must appoint the board. The board is composed of not less than three commissioned officers, at least one senior to the missing soldier or in the grade of major, whichever is higher. *Id.* para. 8-12b.

384 *Id.* para. 8-11.

385 *Id.* para. 8-14. The report also must contain specific information, including: the duration, extent and results of searches; names, identification and original sworn statements; and maps of the area in which the person disappeared. *Id.* paras. 8-14b, 8-14c.

386 *Id.* paras. 8-15, 8-16.

387 **DEP'T OF NAVY, NAVAL** MILITARY PERSONNEL MANUAL (July 1969-86) [hereinafter NAVMILPERSMAN].

388 **Id.** para. 42101000.5.a.

389 **Id.** paras. 42101000.6., 42101000.7.

390 **Id.** para. 42101000.7.

391 **Id.**

392 **Id.** para. 42101000.8.

unauthorized, the commander must submit a detailed report to the CDR, NAVMILPERS, that includes a recommendation as to the proper casualty status.[393] The Secretary of the Navy or his delegate then determines the sailor's proper status under the Missing Persons Act.[394]

3. Marine Corps *Procedures*[395]—Marine Corps policy provides that once a command reports a marine in a DUSW N status, the special courts-martial convening authority (SPCMCA) must convene a board to investigate the circumstances of the disappearance. The board must recommend whether the marine should be declared missing, dead, or in an unauthorized absence (UA) status. Within ten days of the disappearance, the SPCMCA reviews the investigation and by the tenth day declares the marine dead, missing, UA, or found alive. The SPCMCA then submits the investigation and his decision directly to the Commandant of the Marine Corps.[396]

4. Air Force *Procedures*[397]—Air Force policy requires that once a commander places an airman in a DUSTWUN status the command has ten days to conduct search and rescue operations.[398] By the end of the tenth day, the commander must determine whether the absence is voluntary or involuntary.[399] If the absence is involuntary and there is insufficient evidence to declare the person dead, the commander must declare the person missing and ensure that the Casualty Assistance Representative (CAR) submits an initial missing report.[400] Prior to declaring an airman missing and submitting a report, however, the commander must consult with Headquarters, Air Force Military Personnel Center.[401]

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393 *Id.* The report must include "latitude and longitude, distance from nearest land, when applicable; local conditions; extent of searches made; [and] statements of survivors or other members who may have pertinent information concerning the attendant circumstances." *Id.*

394 *Id.*

395 MARINE CORPS ORDER P3040.4C, SUBJECT: MARINE CORPS CASUALTY PROCEDURES MANUAL (Short Title: MARCORCASPROCMAN) (14 **Apr.** 1988) [hereinafter MARCORCASPROCMAN].

396 *Id.* para. 5002.2.

397 DEP'T OF AIR FORCE, INSTRUCTION *36-3002,* CASUALTY SERVICES (26 Aug. 1994) [hereinafter AFI 36-30021.

398 *Id.* para. 2.15.

399 *Id.* para. 2.10.6.

400 *Id.* para. 2.12.2.

401 *Id.* para. 2.12.3. After submitting an initial missing report, the commander must submit supplemental reports as new information becomes available and must maintain continuous surveillance to locate the missing airman. The commander of the affected theater of operations normally assumes this responsibility during wartime. This commander must maintain close contact with the following persons to assist in identifying personnel: escapees, members who have evaded capture, repatriates, rescued United States and allied personnel, parent units, ground forces, and naval forces. *Id.* para. 2.12.7.1.

The above review reflects that Service procedures are similar to the new law in that they require the missing person's commander to conduct an initial investigation.[402] Additionally, after the commander's investigation, the new law requires the Service Secretary to appoint a board to review the facts and make a recommendation.[403] Both the Army and the Marine Corps require a similar review by the GCMCA and the SPCMCA, respectively. The Army adds an additional layer of review by requiring an officer to review the case and make a recommendation to the Secretary, who then decides whether a person may be missing and, if so, requires the GCMCA to conduct a review board.[404] The Navy and Air Force, however, require only that the immediate commander conduct an investigation before a Secretarial decision to place a person in a missing status.

C. Military Services' Policies on Status Review Boards

At the time Congress enacted the new law, the Department of Defense did not provide written guidance on status review board hearings. Shortly after the *McDonald* decision in **1974,** however, the Services promulgated their procedures on status review hearings.[405] With the exception of the Navy,[406] the Services have updated their hearing procedures since that time. Many Service procedures are similar because they reflect Missing Persons Act requirements, such as the requirement to hold a status review board after twelve months in a missing status and upon receipt of additional information.[407] The new law also requires a review board under these circumstances. Many Service procedures also are similar to each other, and to the new law, because they implement the due process requirements outlined in the *McDonald* decision.[409] For example,

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402 ***See*** *supra* pt. II.D. (summarizing the new law's requirement for an immediate commander's investigation).

403 ***See*** *supra* pt. II.E. (summarizing the new law's procedures for an initial determination of status by the Service Secretary).

404 ***See*** *supra* pt. V.B.l. (discussing Army requirements).

405 ***See*** OGC Memorandum for Record, *supra* note **235** and accompanying text (discussing Service procedures promulgated after McDonald **v.** McLucas, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974)).

406 Memorandum, Acting Secretary of the Navy, subject: Department of Navy Regulations for Holding Hearings Whenever a Status Change is Considered Pursuant to the Payment to Missing Persons Act (37 U.S.C. § **551)** (26 Mar. 1974) [hereinafter Navy Memo] (on file with the Office of the POW/MIA Affairs, Naval Military Personnel Command, Department of the Navy). As of this writing, however, the Navy is drafting a new instruction, to be designated DEP'T OF NAVY, INSTRUCTION (NAVIN) 1771.1, PROCEDURE GUIDE: STATUS REVIEW OF MISSING PERSONNEL.

407 37 U.S.C. § 555(a) (1988).

408 ***See*** *supra* pt. II.F. (summarizing the new law's requirement for a subsequent board of inquiry).

409 McDonald v. McLucas, 371 F. Supp. 831 (S.D. N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

the Services provide that dependents who are receiving allotments of a missing person's pay and allowances are entitled to notice and an opportunity to attend a status review hearing.[410] These individuals may attend the hearing at their own expense with privately retained counsel[411] and must receive access to information to be reviewed by the board.[412] Additionally, these individuals may present information at the hearing.[413]

Although similar, each Service policy contains some procedures peculiar to its status review hearings. Only the Army and Air Force, for example, require investigations prior to a status review hearing. The Army policy requires the GCMCA to appoint a board of inquiry if a soldier is still missing by the 300th day after being reported in a DUSTWUN status.[414] The board must evaluate the recommendations of the first board and any additional data.[415] By the 350th day, the GCMCA must review and forward the board report to the CDR, PERSCOM.[416] The CDR, PERSCOM, then uses this report to perform the twelve-month status review required by the Missing

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410 ***See*** AR 600-8-1, *supra* note 377, para. 8-25a (Army policy requiring such notice except if the contemplated status changes do not affect entitlement to pay and allowances, such as a change from "missing in action" to "beleaguered," but cautioning that a subsequent review may disclose that facts warrant a change that would terminate entitlement to pay and allowances); Navy Memo, *supra* note 406, para. 2(a)-(c) (Navy policy); MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and DEP'T OF AIR FORCE, AIR FORCE MILITARY PERSONNEL CENTER INSTRUCTION 36-9, STATUS REVIEW OF MISSING PERSONNEL, para. 3 (31 Mar. 1995) **(Air** Force policy) [hereinafter AFMPCI 36-9].

411 ***See*** AR 600-8-1, *supra* note 377, para. 8-25b, **27** (Army policy); Navy Memo, *supra* note 406, para. 2(a)-(c) (Navy policy); MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy); AFMPCI 36-9, *supra* note 410, para. 3 **(Air** Force policy).

412 ***See*** AR 600-8-1, *supra* note 377, para. 8-25c (Army policy); Navy Memo, *supra* note 406, para. 2(e) (Navy policy); MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy); AFMPCI 36-9, *supra* note 410, para. 4 (Air Force policy). The Army is the only Service, however, to provide guidance on release of classified information. Army policy requires that every effort be made to downgrade classified information, present an unclassified summary, or remove classified portions of information, If the information cannot be downgraded, removed, or summarized, it may not be made available to the hearing officer, and may not be considered in the course of the Army review. *AR* 600-8-1, *supra* note 377, para. 8-25c. ***See*** *also* AFMPCI 36-9, *supra* note 410, para. **5** (requiring the status review board to record the effect, if any, that classified information had on their finding and recommendation, thereby implying that such information may be considered by the board, but without addressing release of that information to dependents).

413 ***See*** AR 600-8-1, *supra* note 377, para. 8-25d (Army policy); Navy Memo, *supra* note 406, para. 2(f) (Navy policy); MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy); and AFMPCI 36-9, *supra* note 410, para. 3 (Air Force policy, also allowing dependents to make a closing argument).

414 *AR* 600-8-1, *supra* note 377, para. 8-20. This board must follow the same procedures as the original board of inquiry. *Id.* para. 8-21.

415 *Id.* para. 8-19a.

416 *Id.* para. 8-22.

Persons Act.[417] Similarly, the Air Force requires that, if there is no change in a missing airman's status within eight months, the commander must conclude the initial investigation by submitting a nine-month investigative report, which is then used in the twelve-month status review process. The commander must submit a report in nonhostile situations and may submit a report in hostile situation ~The Navy and Marine *Corps*, as well as the new law, do not require an investigation prior to a status review hearing.

The composition of the status review boards also varies among the Services. The Army, for example, requires that a single commissioned officer in the grade of major or above conduct the status review hearing.[419] The Navy also requires a single officer to conduct a status hearing[420] and further requires the hearing officer to forward a recommendation and report to a separate status review board.[421] Similar to the new law,[422] both the Marine Corps and the Air Force require a three-member status review board hearing.[423]

Among the Services, only the Air Force allows secondary next of kin not receiving financial benefits under the Missing Persons Act to attend the hearing, but as nonparticipants only.[424] The new law, on the other hand, opens the status review hearing not only to the primary next of kin, but also to other members of the immediate family and any other previously designated persons.[425] Additionally, only the Army and Air Force reflect the new law's requirement for appointment of legal counsel by specifically providing that a hearing officer may receive legal advice.[426]

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417 *Id.* para. 8-23. ***See also*** ***id.*** para. 8-24 (requiring a status review if warranted based on a passage of time, information that indicates a "reasonable presumption" that the missing person is dead, or receipt of "compelling information" concerning the person's whereabouts or fate).

418 AFI 36-3002, *supra* note 397, para. 2.12.8.

419 AR 600-8-1, *supra* note 377, para. 8-26a.

420 Navy Memo, *supra* note 406, para. 2(i).

421 *Id.* para. 2(l). The next of kin are entitled to appear with private counsel and present evidence at the status review hearing. *Id.*

422 ***See*** *supra* pt. II.F.1. (describing the new law's subsequent board of inquiry composition).

423 MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy); AFMPCI 36-9, *supra* note 410, para. 6 (Air Force policy).

424 AFMPCI 36-9, *supra* note 410, para. 3. The Army, Navy, and Marine Corps allow only dependents to attend the board hearings. ***See*** AR 600-8-1, *supra* note 377, para. 8-26a (Army policy); Navy Memo, *supra* note 406, para. 2(k) (Navy Policy); MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy).

425 ***See*** *supra* pt. II.F.3. (summarizing the new law's provision on attendance by family members and others at the subsequent boards of inquiry).

426 *See supra* pt. II.F.2. (summarizing the new law's requirement that an attorney be appointed to advise a subsequent board of inquiry). The Army's hearing officer may request legal advice from the Office of The Judge Advocate General of the Army. AR 600-8-1, *supra* note 377, paras. 8-26a, 8-26d. The **Air** Force requires appointment

Unlike other Service policies, however, the Air Force provides a detailed standard of proof that must be met before the appropriate authority may make a status decision. The Army, Navy, and Marine Corps policies contain the standard of proof for a status decision that is required by the Missing Persons Act, that is, the board must make a finding that the missing person can reasonably be presumed to be living, can reasonably be presumed to be dead, or that the evidence conclusively establishes death.[427] While the Air Force policy also contains this standard of proof,[428] it further explains that a finding that an airman may be reasonably presumed to be living or to be dead must be supported by a preponderance of the evidence.[429] A finding that the evidence establishes conclusively that the airman is dead must be supported by evidence that proves beyond a reasonable doubt that the missing member could not have survived. According to Air Force policy, the recovery of remains is not a prerequisite to a conclusive finding of death, and a passage of time without information may be considered as evidence.[430]

As reflected in Service policy, each Service already requires an investigation prior to placing a service member in a missing status. Additionally, once placed in a missing status, the Services require a status review hearing that provides procedures mandated by the Missing Persons Act and the Fifth Amendment. As a result, many of the Services' accounting procedures are similar to each other and to the new law, Consequently, when the new law was enacted, Service procedures on determining the status of missing persons were quite comprehensive; Senator McCain was probably correct when he stated that they were "fully adequate to accomplish the objective of determining the fate of all of our missing people."[431]

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of a nonvoting legal advisor to advise the board and rule finally on questions of law and procedure. The Air Force also requires a separate judge advocate to prepare a legal review of the status review hearing. AFMPCI 36-9, *supra* note 410, paras. 7, 10.

427 AR 600-8-1, *supra* note 377, para. 8-26g (Army policy); Navy Memo, *supra* note 406, para. 2(l) (Navy policy); MARCORCASPROCMAN, *supra* note 395, para. 5003.1 (Marine Corps policy). The Missing Persons Act requires that the Secretary concerned, or his designee, may direct a continuance of a missing person's status "if the member can reasonably be presumed to be living," or make a finding of death "when he considers that the information received, or a lapse of time without information, establishes a reasonable presumption that a member in a missing status is dead." 37 U.S.C. §§ 555(a)(1), 556(b) (1988). Additionally, the Act allows Service Secretaries to make official reports of death "[w]hen the Secretary concerned receives information that he considers establishes conclusively the death of a member." *Id.* § 556(b).

428 AFMPCI 36-9, *supra* note 410, para. 8.1.

429 *Id.* para. 8.2.

430 *Id.* ***See*** *also* AR 600-8-1, *supra* note 377, para. 8-24 (Army policy providing that a case review may be warranted based on a passage of time or receipt of compelling information concerning the soldier's whereabouts or fate).

431 ***See*** *supra* note 20 and accompanying text.

Although new investigatory procedures may not have been needed, additional procedures designed to open the process to family members were necessary. Current Department of Defense and Service policies on missing persons investigations still do not allow sufficient family-member participation in the process. Only dependents who are entitled to due process under the Fifth Amendment because they receive benefits are given access to information to be reviewed by the board and are allowed to attend the status review hearings (except that the Air Force allows other family members to attend the hearing). Additionally, none of the Service policies effectively address the impact of classified information on the review process. The only Service to address this issue specifically is the Army, and its policy is that the information, if it cannot be downgraded, may not be provided to dependents or considered by the status review board.[432]

As both the Senate Committee on Armed Services and the House Committee on National Security observed, many persons perceived the Department of Defense as an "unresponsive bureaucracy" that ignored the family members of missing personnel from the Vietnam Conflict.[433] As the Senate Select Committee on POW/MIA Affairs concluded in 1993, much of the controversy surrounding the government's handling of the POW/MIA issue in Southeast Asia could have been avoided if the relevant documents had been declassified and made available to family members long ago. As the committee noted, "secrecy breeds the suspicion that important information is being withheld, while fueling speculation about what that information might be."[434] The new law effectively addresses this problem by allowing all family members to attend the status review hearings, mandating that certain information be kept in a missing person's personnel file or, if not in the personnel file, requiring the file to contain a notice that the information exists and compelling release of the personnel file to family members.[435]

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[432] *See supra* note 412 (outlining the Army policy on the use of classified information in status review hearings).

[433] ***See*** *supra* notes 11, 14 and accompanying text.

[434] SENATE OS POW/MIA AFFAIRS REPORT, *supra* note 15, at 30.

[435] 10 U.S.C.A. §§ 1504(g), 1506(b), 1506(f) (West Supp. May 1996). The new law does not, however, address the most recent litigation on missing persons, that is, the identification of remains. ***See,*** *e.g.*, Hart v. United States, 681 F. Supp. 1518 (N.D. Fla. 1988), *reu'd,* 894 F.2d 1539 (11th Cir. 1990), *cert.* ***denied,*** 498 U.S. 980 (1990) (alleging intentional infliction of emotional distress under the FTCA by improperly identifying remains); Simmons v. United States, 754 F. Supp. 274 (N.D. N.Y. 1991) (alleging intentional infliction of emotional distress under the FTCA by changing an airman's status from KIA/BNR to KIA, body recovered on the basis of the identification of a single tooth).

The new law's requirement for uniform procedures on personnel accounting throughout the Department of Defense will assist in assuring family members that the Department of Defense is finally taking the lead on this issue.[436] The Department of Defense should have promulgated uniform procedures on its own initiative long ago. In leaving these procedures in the hands of the Military Services, the Department of Defense contributed to the perception that it was not adequately involved in overseeing this issue. Finally, by authorizing judicial review of certain Secretarial decisions, family members may be assured that they have some recourse if they are not satisfied with a Military Service's status decision.[437]

VI. Proposals to Improve the New Law

Although the new procedures for determining the status of missing personnel are similar to existing Service regulations in many respects, the new law is significantly different in that it: (1) requires a missing person's counsel;[438] (2) provides a "credible evidence" standard of proof to declare a person dead;[439] and (3) requires further review boards every three years for thirty years, regardless of whether new information is received.[440] These provisions, among others, are probably those that Senator McCain was referring to when he stated that the Missing Persons Act contains "the most egregious . . . unworkable, unnecessary, and counter-productive provisions related to missing service personnel."[441] This section discusses these problem areas, explains why they should be amended, and proposes needed changes. At appendix A are the proposed legislative amendments.

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436 10 U.S.C.A. § 1501(b) (West Supp. 1996).

437 *See id.* § 1508(a) (providing that judicial review is to be governed by the standard in 5 U.S.C. § 706 (1988), which states, in part, that the reviewing court shall "(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."). Under the Missing Persons Act, however, federal court review of status decisions was always available to family members receiving allotments of a missing person's pay and allowances. *See, e.g.,* Crone v. United States, 538 F.2d 875, 883 (Ct. Cl. 1976), *reh'ggranted,* 210 Ct. Cl. 748 (1976) (providing that dependents receiving benefits under the Missing Persons Act have standing to challenge Secretarial decisions affecting those benefits, and that the standard of review under the Missing Persons Act is the "arbitrary and capricious standard — the same standard as that under the new law).

438 10 U.S.C.A. § 1504(f) (West Supp. May 1996).

439 *Id.* § 1507(a).

440 *Id.* § 1505(b).

441 ***See*** *supra* note 19. *See also supra* notes 20-21 and accompanying text (discussing more fully Senator McCain's opinion on the new law).

A. Board Proceedings

The law contains a number of board procedures that must be amended. The amendments proposed in this section are designed to provide the Department of Defense and the family members with board procedures that ensure a fair and workable process.

1. Delete Requirement *for* Missing Person's Counsel — The requirement for the Secretary concerned to appoint a missing person's counsel should be deleted as inappropriate and unnecessary. The new law requires the Secretary to appoint counsel to "represent" each person covered by an initial board of inquiry, a subsequent board of inquiry, and a further review board.[442] This attorney is in addition to the judge advocate, or civilian attorney, appointed to provide legal counsel to the boards.[443] Additionally, the law requires the Department of Defense to forward all new information relating to the missing person to the missing person's counsel, as well as the primary next of kin and previously designated person. The head of the Department of Defense office established by the law also must obtain the advice of the missing person's counsel prior to deciding whether the information warrants a further review board.[444]

First, requiring a separate counsel to represent the missing person implies that Service Secretaries cannot be trusted to apply the law. This implication appears validated by the law's requirements that the missing person's counsel perform many duties normally considered to be those of a board's legal advisor, such as assisting the board in ensuring that all appropriate information is collected, logged, filed, and safeguarded, advising the Department of Defense on whether a further review board is necessary based on new information, and monitoring board deliberations. With the assistance of the legal advisor to the board, there is simply no support for the proposition that the Service Secretary cannot correctly apply the new law.

Second, other than attempting to protect the interests of his "client" by ensuring that the board appropriately applies the law (a function already performed by the board's legal advisor), the missing person's counsel performs no other function. The counsel presumably will have never met the missing person and has no more knowledge of what that person would have wanted under the circumstances than the board and the Secretary. Consequently, the missing person's counsel is in the awkward position of attempting to represent a client with whom he has no attorney-client relationship and for whom he has no personal knowledge. The only individuals who

442 10 U.S C.A. §§ 1503(f), 1504(f), 1505(d) (West Supp. May 1996).

443 *Id.* §§ 1503(c)(4), 1504(c)(4), 1505(d).

444 *Id.* § 1505(c)(2).

may know what the missing person may want are the person's family members. Therefore, either the counsel is left to decide alone what is best for the missing person or the counsel may attempt to discover the client's wishes by consulting family members. If the missing person's counsel decides on this latter approach, the counsel risks becoming embroiled in arguments between spouses, children, parents, and designated persons over what these individuals believe the missing person would have wanted. The entire situation is magnified considerably when the missing person's counsel must represent several "clients" subject to the same board review.

2. Restrict the Process Afforded to Family Members and Other Designated Persons—The Service Secretary should provide primary next of kin, immediate family members, and previously designated persons notice and an opportunity to attend a status review hearing and allow them access to unclassified information. Only the primary next of kin, however, should be entitled to attend the hearing with a lawyer, present relevant information at the hearing, and submit written objections to the board recommendation. If there is no primary next of kin, the law should afford the previously designated person the same process. This procedure will further the congressional intent to "unveil the curtain of secrecy" surrounding the current procedure while at the same time protect the process from becoming an adversarial hearing. As the district court in *United States v. Townsend* correctly observed, "[t]he status review hearing is not the kind of situation which requires an adversarial, trial-type hearing."[446]

The new law entitles the primary next of kin,[447] all members of the immediate family,[448] and any previously designated person:[449] (1) notice and an opportunity to attend the hearing,[450] (2) access to the missing person's personnel file and any other unclassified information or documents relating to the person's whereabouts,[451] (3) an opportunity to present relevant information at the board proceeding and (4) an opportunity to submit written objections to any recommendation of the board.[453] The only right enjoyed by the primary next of kin that other members of the immediate family do not have is the right to attend the hearing with private counsel.[454] The

445 *See supra* note 9 and accompanying text (statement of Rep. Gilman upon introduction of H.R. 945, The Missing Service Personnel Act of 1995).

446 476 F. Supp. 1070, 1074 (N.D. Tex. 1979).

447 *See supra* note *30* (defining "primary next of kin").

448 *See supra* note 31 (defining "member of the immediate family").

449 *See supra* note **32** (defining "previously designated persons").

450 10 **U.S.C.A.** § 1504(g)(1)-(2) (West Supp. May 1996).

451 *Id.* § 1504(g)(4)(B).

452 *Id.* § 1504(g)(4)(C).

453 *Id.* § 1504(g)(4)(D).

454 *Id.* § 1504(g)(4)(A)

new law extends this right, however, to the previously designated person as well.[455]

According to the holding in McDonald *v. McLucas,*[456] the Fifth Amendment[457] requires that dependents[458] who are authorized allotments of a missing person's pay and allowances under the Missing Persons Act[459] are entitled to procedural due process prior to a status decision that may affect their allotments. The new amendments to the Missing Persons Act authorize dependents of persons determined to be missing under the new law to receive allotments of the missing person's pay and allowances.[460] Consequently, under McDonald, dependents of persons found missing under the new law are entitled to procedural due process prior to a Secretarial decision that the missing person is dead.

The new law, however, extends due process to the primary next of kin, other members of the immediate family, and any other previously designated person without regard to their status as dependents under the Missing Persons Act.[461] Because one purpose of the new law is to "unveil the curtain of secrecy which currently surrounds any [Department of Defense] DOD decision concerning a person's status as missing in action,"[462] the law should extend some process to certain individuals who may not be entitled to a missing person's pay and allowances. The process envisioned by the new law will, however, foster an adversarial, trial-type atmosphere that is not helpful in assisting either the family or the Department of

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455 *Id.*

456 **See** McDonald v. McLucas, 371 F. Supp. 831,834 (S.D. N.Y. 1974) (three-judge court), *aff'd mem.,* 419 U.S. 297 (1974) (holding that prior to a Secretarial determination of death under the Missing Persons Act, dependents are entitled to the following procedural due process: (1) notice and an opportunity to attend the hearing, with a lawyer if they choose; (2) reasonable access to the information upon which the reviewing board will act; and (3) an opportunity to present any information which they consider relevant to the proceedings).

457 U.S. CONST. amend. V.

458 The Missing Persons Act defines a "dependent" to include a spouse, unmarried child under 21 years of age; a dependent mother or father; a dependent designated in official records; and a person determined to be dependent by the Secretary concerned or his designee. 37 U.S.C. § 551(1) (1988).

459 ***See*** 37 U.S.C. § 553(e)-(f) (Supp. V 1993) (authorizing the Secretary concerned to direct the initiation, continuance, discontinuance, increase, decrease, suspension, or resumption of payments of allotments from the pay and allowances of a missing person until the Secretary receives evidence that the member is dead or has returned to military control).

460 NDAA FY96, *supra* note 23, § 569(c)(2)(C).

461 However, only the primary next of kin and previously designated persons may attend the board hearing with counsel. 10 U.S.C.A. § 1504(g)((4)(A) (West Supp. May 1996).

462 ***See*** *supra* note 9 and accompanying text (statement of Rep. Gilman upon introduction of H.R. 945, The Missing Service Personnel Act of 1995).

Defense in resolving a missing person's status. For example, one can foresee situations in which the missing person's family members do not have the same interests. **As** the *McDonald* court observed, during the Vietnam Conflict some family members actively contested any change of status, while others, who had accepted the apparent fate of death of their missing service members, wanted the services to make immediate determinations of death so that they might begin their lives anew.[463] Because all family members and previously designated persons may present information at the board proceedings and submit written objections to board recommendations, a tremendous potential exists for the hearing to become an adversarial battle of the family, with no one "winning," not the Military Service nor the family members.

This situation is exacerbated when the missing person has named a nonfamily member as a "previously designated person" entitled to the same rights as the primary next of kin, including the right to be represented by counsel. Potentially, then, there could be four or more attorneys at the hearing: the legal advisor to the board, the missing person's counsel, and the counsels for the primary next of kin and the previously designated persons. Who will this previously designated person be? When deploying to Operation Desert Shield, this author assisted many soldiers with wills. **A** surprising number of young, unmarried soldiers named girlfriends as primary beneficiaries of their wills and insurance policies, including girlfriends of very short duration. If these soldiers were willing to designate such individuals to receive all of their assets on their death, they will not hesitate to confer on them the status of "designated person" under the new law.[464] Certainly, if the person has no primary next of kin, the person should be able to designate someone else to receive the due process benefits contemplated by the new law. Otherwise, the law should not entitle the designated person to the same process as the primary next of kin.

3. Amend Standard of Proof to Declare a Person Dead—The credible evidence standard of proof for declaring a person dead should be replaced by a standard requiring that death be established by clear and convincing evidence. The new law outlines a three-prong test that must be met before a Secretary may declare a missing person dead. First, the Secretary must find that there is credible evidence that the person is dead. Second, the Secretary must decide that the United States possesses no credible evidence

463 McDonald v. McLucas, 371 F. Supp. 831, 836 (S.D. **N.Y.** 1974) (three-judge court), *aff'd mem.*, 419 U.S. 297 (1974).

464 One can even imagine scenarios where a girlfriend is the "designated person" fighting over the person's status with the wife. Under the new law, the girlfriend would have the same rights as the person's wife.

that the person is alive. Third, United States representatives must have made a complete search of the area where the person was last seen and must have examined the records of the government or entity having control over that area, unless after making a good faith effort the representatives are not granted access.[465]

Under the Missing Persons Act, the Secretary may make a finding of death if "the information received or a lapse of time without information establishes a reasonable presumption that a member in a missing status is dead."[466] Some individuals believe that this standard allows a Secretary to declare a person dead based only on the length of time in a missing status without making any effort to locate the missing person. Therefore, one purpose of the new law was to ensure "that a person is not declared dead solely because of the passage of time."[467] This purpose is assured by the third prong of the new test which requires that United States representatives make a complete search of the area where the person was last seen and examine the records of the government or entity having control over that area, unless not granted access.[468] Thus, a passage of time without information is not sufficient; the United States must attempt to locate the missing person before the Secretary may declare the person dead.

Unlike the third prong of the new test, however, the first two prongs do not further the intent of Congress that a person not be declared dead based solely on the passage of time. Under any standard of proof, including the new law's, the length of time in a missing status, although not determinative in itself, is one factor that a Secretary must consider in deciding the person's status. For example, after a long period of time without additional information, a Secretary may decide under the new law that previously credible evidence that a person is alive is no longer credible and the period of time without additional information has become credible evidence that the person is dead.

In addition to not furthering the congressional purpose, the "credible evidence" standard of proof in the test's first two prongs will result in confusion because neither the new statute, case law, nor military regulations define "credible evidence." Generally, three standards of proof exist: (1) preponderance of the evidence, (2) clear and convincing evidence, and (3) evidence beyond a reasonable

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465 10 U.S.C.A. § 1507(a) (West Supp. May 1996).

466 **37** U.S.C. § 555(b) (Supp. V 1993).

467 NDAA for FY96, *supra* note **23,** § 569(a). The Department of Defense denied, however, that it had ever been its policy to declare a missing member dead primarily on the basis of passage of time. Department of Defense Report, *supra* note 351.

468 10 U.S.C.A. § 1507(a)(3) (West Supp. May 1996).

doubt. The function of these standards is to instruct the factfinder on the degree of confidence that our society thinks that the factfinder should have in the correctness of factual conclusions.[469] The standard of proof, therefore, allocates the risk of error and indicates the relative importance attached to the ultimate decision.[470] At one end is the preponderance of the evidence standard, which allows both parties to share the risk of error in "roughly equal fashion."[471] This standard is generally used, for example, in decisions regarding money.[472] At the other end is the beyond a reasonable doubt standard used in criminal case, where the interests of the defendant in liberty or life require a standard of proof designed to exclude, as nearly as possible, the likelihood of an erroneous decision by imposing almost all of the risk of error upon society.[473]

Neither of the above standards appear appropriate in deciding whether a missing person is dead. The missing person and his family should not share equally with the government in the risk that a Secretary's decision may be erroneous such that a preponderance of the evidence standard is appropriate. Neither, however, should the government bear almost the entire risk by using the criminal standard of evidence beyond a reasonable doubt. If a person who is declared dead is later returned to United States control, the person is entitled to all benefits lost because of the declaration of death, including pay and allowances accrued during that period.[474]

The appropriate standard of proof is the third, intermediate standard: proof by clear and convincing evidence. The Supreme Court requires proof by clear and convincing evidence where particularly important individual interests or rights are at stake.[475] Both the missing person and his family members have an important interest at stake in a Secretarial decision that a missing person is dead. As reflected in the reaction of some families of service members missing in Southeast Asia, this interest generally is more than a mere stake in entitlement to allotments. Consequently, the clear and convincing evidence standard of proof is preferable to the new law's peculiar credible evidence standard because it is an established standard of proof historically used in circumstances like those

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469 *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

470 Addington v. Texas, 441 U.S. 418, 423 (1979).

471 *Id.*

472 Santosky v. Kramer, 455 US. 745, 755 (1982).

473 *In re* Winship, 397 U.S. at 370.

474 10 U.S.C.A. § 1511 (West Supp. May 1996).

475 *See, e.g.,* Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights); Woodby v. INS, 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 US. 350, 353 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 125, 159 (1943) (denaturalization).

of the new law where important individual interests are at stake.

4. *Delete Requirement for a Board Member with a Similar Occupational Specialty—The* law requires that both the subsequent and further review boards have one member with an "occupational specialty similar to that of one or more of the persons covered by the inquiry."[476] This requirement is not necessary and should not be statutorily mandated. In many instances, the person's disappearance will have no direct correlation with his military occupational specialty, and to require such a person to be a member of the board furthers no purpose. If a Secretary believes such a person would be helpful to the board, the Secretary should have the discretion to appoint that person.

B. Preliminary Assessment and Initial Board of Inquiry Procedures

The preliminary assessment and initial board of inquiry procedures must be amended to ensure a thorough investigative process so that the Secretary concerned may make a decision on the person's status based on all available information. Therefore, the law should afford the immediate commander additional time to conduct the preliminary assessment and should grant the Secretary discretion to designate the appropriate authority to review the assessment to ensure that the record is complete.

1. Extend Time Period to Conduct a Preliminary Assessment— The immediate commander should be allowed seven days to perform the preliminary assessment.[477] Currently, if the immediate commander decides that the person should be placed in a missing status, the commander must transmit a report to the theater component commander within forty-eight hours of receiving the information on the disappearance.[478] Two days is not enough time for the immediate commander to gather sufficient evidence, decide on a recommendation of missing, and forward a report to the theater component commander.[479]

2. *Delete Requirement to Forward Preliminary Assessment Through Theater Component Commander—The* provision requiring the immediate commander to forward the preliminary assessment

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[476] 10 U.S.C.A. § 1505(d)(3)(A) (West Supp. May 1996)

[477] Existing Department of Defense procedures allow a person to remain in a DUSTWUN status for 10 days. DODI 1300.18, *supra* note **367,** para. F.2.b.

[478] 10 U.S.C.A. § 1502(a)(2) (West Supp. May 1996).

[479] However, the new law allows the Secretary of Defense to grant an extension of this time period, on a case-by-case basis and in 48-hour increments, only. *Id.* § 1501(b)(4).

through the theater component commander should be deleted.[480] The theater component commander is the commander of all forces of a particular armed force assigned to the combatant command who is directly subordinate to the commander of the combatant command.[481] The law not only requires the report to be forwarded through the theater component commander, but it makes this commander responsible for ensuring that "all necessary actions are being taken and all appropriate assets are being used" to locate the missing person.[482] Consequently, the theater component commander is not simply a conduit for the immediate commander's report; he must also ensure that everything is being done—and done right—to account for the missing person.

The theater component commander is not the appropriate person to ensure the sufficiency of such an investigation for at least two reasons. First, when a person has disappeared during a hostile action, the theater component commander will be intimately involved in that hostile action, conducting combat operations. Because of these duties, it is uncertain whether such a commander will be able to provide the high level of scrutiny to these administrative investigations that Congress has in mind. Second, the theater component commander likely will not have the background and expertise needed to ensure that the investigations are thorough and complete.

The Service Secretary should be allowed the discretion to designate the authority whom the Secretary believes has the knowledge and expertise to ensure that all necessary actions are being taken and all appropriate assets are being used. For example, the Services currently require the appointing authorities to forward their investigations directly to their headquarters personnel commands.[483] This procedure is appropriate because the personnel commands have the institutional knowledge and expertise in personnel matters, including missing persons investigations and procedures, necessary to ensure

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480 *Id.* § 1502(a)(2). This provision does not prohibit the Department of Defense from requiring the immediate commander to forward the report through any number of intermediate commanders. Such a requirement could result in a substantial delay before the report reaches the Theater Component Commander because the law does not require that the report reach the Theater Component Commander within a certain time period.

481 *Id.* § 1513(8).

482 *Id.* § 1502(b).

483 The Army requires the CAC to forward the investigation directly to CDR, PERSCOM, in accordance with AR 600-8-1, ***supra*** note 377, para. 8-8b. The Navy requires the investigation be forwarded to the CDR, NAVMILPERS under NAVMILPERSMAN, ***supra*** note 387, para. 42101000.8. The Marine Corps requires its investigations be forwarded to the Commandant of the Marine Corps pursuant to MARCORCASPROCMAN, ***supra*** note 395, para. 5001.3. Finally, the Air Force requires that the investigations be forwarded to the Head, Personnel Affairs Branch under AFI 36-3002, ***supra*** note 397, para. 2.12.3.

that these complicated investigations are thorough and complete.

3. Amend Board Report Release Requirements — Similar to other administrative investigations, the law should be amended to provide that, once the Secretary makes a final status decision, the board report may be released in accordance with law. As enacted, the law prohibits the Service Secretary from making a board report public until one year after the date the board submitted its report to the Secretary.[484] Because the law requires the Secretary to decide a person's status no later than thirty days after receiving a board report,[485] a report generally will not be released until eleven months after the Secretary makes a final decision.

In a law concerned with access to information on a missing person, the prohibition on release of the board report seems misplaced. As an exception to this release prohibition, the law requires the Secretary to provide certain family members with an unclassified summary of the immediate commander's report and the report of the board of inquiry no later than thirty days after making a final decision on the person's status. These individuals presumably may do whatever they wish with the board report, including making it public despite the Secretarial prohibition.

C. Subsequent and Further Boards *of* Inquiry

Finally, various provisions on subsequent boards of inquiry and further review boards need to be amended to clarify when these boards are required.

1. Amend Who May Be the Subject *of* a Subsequent Board *of* Inquiry — The law should require the Service Secretary to convene a subsequent board of inquiry only in cases of persons whom the Secretary placed in a missing status as a result of an initial board of inquiry. The Secretary is now required to convene a subsequent board of inquiry to review the status of all individuals who were the subject of an initial board of inquiry, including those whom the Secretary declared dead, absent without leave, or deserters. Consequently, the law extends procedural due process to all these individuals, their family members, and previously designated persons. Because Congress intended the law to apply to those who are involuntarily absent,[486] the law should not extend its procedural protections to those whom the Secretary determines are voluntarily absent. Once the Secretary declares an individual to be dead, no additional process should be required.

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484 **10** U.S.C.A. § 1503(g)(3) (West Supp. May 1996).

485 *Id.* § 1503(i).

486 ***See*** *id.* § 1501(c) (providing that the **Act** covers certain persons "who become involuntarily absent as a result of a hostile action").

2. Amend Requirement to Conduct a One-Year Subsequent Board of *Inquiry*—The law should be amended to provide that a one-year subsequent board of inquiry is not required if, within the one-year period, the Service Secretary convened a subsequent board of inquiry because of additional information that may change the person's status. The one-year subsequent board of inquiry is now required, without exception. Therefore, even if the Secretary has recently conducted a board within the one-year time period because of receipt of additional information, another board is required after one year. This requirement is unnecessary. One board within a one-year period is adequate, especially given that the law requires a further review board any time after a subsequent board of inquiry when the Secretary receives information that could change the person's status.[487]

3. Clarify Time for Convening Subsequent and Further Review Boards—The law should be clarified to provide that the time period for calculating when the Secretary must convene the subsequent and further review boards begins to run from the date that the immediate commander forwards his report. As currently written, the point in time on which to calculate these periods is not clear because it is described in three different ways.

First, the law requires a Secretary to notify certain family members that a subsequent board of inquiry will convene "on or about one year after the date of the first official notice of the disappearance of the person."[488] Then, the law provides that the Secretary must convene a subsequent board of inquiry "on or about one year after the date of the transmission of [the immediate commander's report]."[489] Finally, the law requires the Secretary to conduct a three-year further review "on or about three years after the date of the initial report of the disappearance of the person."[490]

The first two provisions attempt to describe the same point in time, that is, when the one-year time period begins to run for the purpose of deciding when a subsequent board of inquiry must convene. For clarity, these provisions should use the same phraseology to describe when the one-year period begins to run. Further, there is no reason to differentiate the points in time from when the one-year and three-year reviews begin to run.

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487 *Id.* § 1505(b)(2).

488 *Id.* § 1503(j)(2).

489 *Id.* § 1504(b).

490 *Id.* § 1505(b)(1)(A).

4. Clarify When *a* Further Review Board *Is* Required—The provision of the new law requiring three-year further review boards "in the case of a missing person who was last known to be alive or who was last suspected of being alive" must be amended to delete the quoted language.[491] Also, the law should be amended to provide that the Secretary is not required to appoint a board more than twenty years, instead of thirty years, after the immediate commander forwarded his report.[492]

First, the language requiring a board only for those missing persons last known or suspected of being alive inappropriately implies that the law contemplates carrying persons in a missing status who were not last known or suspected of being alive. If the Service Secretary has no "suspicion" that the person is alive, surely the Secretary should make a finding of death. The law does not require the Secretary to ever review the missing status of an individual who was not last known or suspected of being alive, unless the Secretary receives information that may change the person's status. Consequently, such a person could remain in a missing status indefinitely. Furthermore, all missing persons, including those apparently held in a missing status who were not last known or suspected of being alive, continue to accrue pay and allowances.[493] The Service Secretary may also initiate, continue, discontinue, increase, decrease, suspend or resume payment of allotments to dependents from the pay and allowances of these missing persons.[494] Potentially, an individual not last known or suspected of being alive could continue to accrue pay and allowances. His dependents could continue to receive allotments indefinitely without any requirement to review the person's status.

Next, the law should be amended to require further review boards every three years for twenty years, not thirty years. This will make the requirement more manageable for the Military Services, while at the same time ensure that the Service Secretary review a missing person's status for a reasonable length of time after the person's disappearance.

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491 *Id.* § 1505(b).

492 *Id.* § 1505(b)(3).

493 37 U.S.C. § 552 (1988& *Supp.* V 1993), *amended by* NDAA *for* FY96 *supra* note 23, § 569(c)(2).

494 37 U.S.C. § 553 (1988& Supp. V 1993), *amended by* NDAA *for* FY96, *supra* note 23, § 569(c)(3).

VII. Conclusion

> *On a subject as personal and emotional as the survival of a family member there is nothing more difficult than to be asked to accept the probability of death when the possibility of life remains.*
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> . . .
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> *Unfortunately, the existence of a strong "accountability process" cannot stop the pain in a family member's heart, nor can it substitute for the gut belief held by some that one or more U.S. POWs survive. . . . These kinds of differences need not lead to differences of goal. It does not matter with what emotions we proceed at this point to seek further answers; it is important only that we continue looking as long as there is good reason to believe that additional answers may be found.*
>
> — *Senate Select Committee on POW/MIA Affairs*[495]

Because of circumstances beyond our government's control, there always will be cases of missing persons that cannot be resolved either by the recovery and identification of remains or by the return of the person to military control. Sadly, this is a fact of war. Our country must, however, make every possible effort to account for its personnel. The movement to enact new laws on accounting for missing persons grew out of the frustrations with the Missing Persons Act of some family members of those declared missing during the Vietnam Conflict. Congress, however, never intended the Missing Persons Act to be a law on accounting for missing persons; Congress intended the law to relieve the financial hardship of a missing person's family members by providing them an allotment of the missing person's pay and allowances. The Military Services have built on the Missing Persons Act, however, by promulgating policies on accounting for missing persons. At the time of the new law, Service procedures on determining the status of missing personnel were comprehensive and "fully adequate to accomplish the objective of determining the fate of all of our missing people."[496] These procedures need to be updated, however, to address concerns of family members regarding their involvement in the process and the release of information to them about their missing service members.

The Department of Defense and the Military Services must now implement the new law. Because existing Service regulations

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495 SENATE POW/MIA AFFAIRS REPORT, *supra* note 15, at 3, 43.

496 *See supra* note 20 and accompanying text (statement by Senator McCain).

contain many similar investigative procedures, implementing many of the new rules should not be difficult. On the other hand, implementing the law's more complicated procedures will require close supervision by judge advocates and civilian attorneys. Congress would ease implementation, however, by enacting the amendments I suggest. After enacting these amendments, and with vigilant oversight by judge advocates and others within the Department of Defense, Congress will have succeeded in accomplishing what it intended: A law ensuring that the government accounts for all service members and certain civilians who are missing as a result of a hostile action and that these individuals are not declared dead solely based on the passage of time.[497]

[497] NDAA for FY96, *supra* note 23, § 569(a).

APPENDIX A

A BILL

To amend Chapter 76 of Title 10, United States Code (Missing Persons), to clarify procedures on accounting for certain missing personnel.

Chapter 76 of Title 10, United States Code, is amended as follows:

(1) Section 1502 is amended—

(A) in subsection (a)(2) by striking out "48 hours" and inserting in lieu thereof "seven days" and by striking out "theater component commander with jurisdiction over the missing person'' and inserting in lieu thereof "Secretary concerned, or his delegee"; and

(B) by striking out subsection (b) and redesignating subsection (c) as subsection (b); and

(C) in subsection (c), now subsection (b), by striking out the second sentence.

(2) Section 1503 is amended—

(A) by striking out subsection (f) and by redesignating subsection (g) as subsection (f), subsection (h) as subsection (g), subsection (i) as subsection (h), subsection (j) as subsection (i) and subsection (k) as subsection (j); and

(B) in subsection (g)(3), now subsection (f)(3), by striking out the entire subsection and inserting in lieu thereof "The Secretary of Defense shall release a report submitted under this subsection with respect to a missing person in accordance with laws providing for release of Government documents to the public."; and

(C) in subsection (j)(2), now subsection (i)(2)—

(i) by inserting at the beginning of the subsection "with respect to a person determined by the Secretary concerned to be in a missing status,"; and

(ii) by striking out "of the first official notice of the disappearance of that person" and inserting in lieu thereof "of the transmission of a report concerning the person under section 1502(a)(2)".

(3) Section 1504 is amended—

(A) in subsection (a) by striking out "covered by a determina-

tion" and inserting in lieu thereof "determined to be in a missing status by the Secretary concerned"; and

(B) in subsection (b)—

(i) by striking out "DATE OF APPOINTMENT" and inserting in lieu thereof "ONE-YEAR BOARD'; and

(ii) by inserting a new sentence "A board is not required under this subsection if the Secretary concerned convened a board in accordance with subsection (a) to review the status of the missing person." at the end of the subsection; and

(C) in subsection (d)(3), by striking **"(A)** has an occupational specialty similar to that of one or more of the persons covered by the inquiry; and" and redesignating subsection (B) as subsection (A) and subsection (C) as subsection (B); and

(D) by striking out subsection (f) and redesignating subsection (g) as subsection (f), subsection (h) as subsection (g), subsection (i) as subsection (h), subsection (j) as subsection (i), subsection (k) as subsection (j), subsection (1) as subsection (k), and subsection (m) as subsection (l); and

(E) in subsection (g)(4)(A), now subsection (f)(4)(A), by inserting ", if no such person can be located after a reasonable effort," after "who is the primary next of kin or"; and

(F) in subsection (g)(4)(C), now subsection (f)(4)(C), by inserting "in the case of an individual who is the primary next of kin, or if no such person can be located after a reasonable effort, the previously designated person,'' at the beginning of the subsection; and

(G) in subsection (g)(4)(D), now subsection (f)(4)(C), by inserting "in the case of an individual who is the primary next of kin, or if no such person can be located after a reasonable effort, the previously designated person," at the beginning of the subsection; and

(H) in subsection (h)(3)(A), now subsection (f)(3)(A), by striking out "counsel for the missing person appointed under subsection (f)" and inserting in lieu thereof "legal counsel to the board appointed under subsection (d)(4)"; and

(I) in subsection (k)(1) by striking out "(j)" and inserting in lieu thereof "(i)"; and

(J) by striking subsection (k)(1)(B), now (j)(1)(B), and redesignating subsection (j)(1)(C) as (j)(1)(B); and

(K) in subsection (k)(1)(C), now subsection (j)(1)(B), by striking out "(g)" and inserting in lieu thereof "(f)".

(4) Section 1505 is amended—

(A) in subsection (b)(1) by striking out "who was last known to be alive or who was last suspected of being alive"; and

(B) in subsection (b)(1)(A) by striking out "initial report of the disappearance of the person under section 1502(a)" and inserting in lieu thereof "transmission of a report concerning the person under section 1502(a)(2)"; and

(C) in subsection (b)(3)(A) by striking out "30" and inserting in lieu thereof "20"; and

(D) in subsection (b)(3)(B) by striking out "30" and inserting in lieu thereof "20"; and

(E) in subsection (c)(2)—

(i) by striking "(A) the designated missing person's counsel for that person, and (B)"; and

(ii) by inserting after "the primary next of kin and" the phrase ", if no such person can be located after a reasonable effort,"; and

(F) in subsection (c)(3) by striking out ", with the advice of the missing person's counsel notified under paragraph (2),".

(5) Section 1507 is amended in subsection (a)—

(A) by striking out "(1) credible evidence exists to suggest that the person is dead; (2) the United States possesses no credible evidence that suggests the person is alive; and" and inserting in lieu thereof "(1) death is established by clear and convincing evidence, and"; and

(B) by redesignating subsection (3) as subsection (2).

(6) Section 1513 is amended—

(A) in subsection (3)(C) by striking out "credible" and inserting in lieu thereof "clear and convincing"; and

(B) by striking out subsection (8).

THE BRITISH COURTS-MARTIAL SYSTEM: IT AIN'T BROKE, BUT IT NEEDS FIXING

JUDGE J.W. RANT*

I. Introduction

Discussions have been in progress since 1991 about the possible reform and revision of some of the courts-martial trial and post-trial procedures. The Service Discipline Acts are due for renewal in 1996, and the quinquennial review of that legislation is now in progress. Coincidentally, in early December 1995, the Report of the European Commission on Human Rights on the case of *Findlay*[1] was published. Alexander Findlay was a British soldier who pleaded guilty to various offences at his court-martial. The court sentenced him to two years imprisonment. After exhausting his post-trial remedies, he made an application to the Commission submitting that the treatment of his case by the military authorities was contrary to Article 6(1) of the European Convention on Human Rights. The Report of the Commission found in his favour. As a consequence of these events, some decisions have been made, and the results have been incorporated into the Armed Forces Bill. This bill will become the enabling Act of Parliament by which the Service Acts will be amended and renewed.

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1 Report of the Commission on Human Rights, Application No. 22107193, Alexander Findlay [hereinafter Report]. Alexander Findlay joined the British Army, 2d Battalion Scots Guards, in 1980. He was court-martialed on 11 November 1991. He pleaded guilty at his general court-martial to three offences of common assault, two offences of conduct to the prejudice of good order and military discipline (contrary to section 69 of the Army Act 1955), and to two offences of making threats to kill. The first charge on the second charge sheet was one of disobedience to standing orders. The charges arose out of an incident during the course of which Findlay, who was in an accommodation block for soldiers at the time, and who was armed with an automatic pistol, pointed it at other soldiers, discharged it twice (without causing injury), and threatened to kill two of the persons there present. He was disarmed and found to be heavily under the influence of alcohol. After hearing the facts and listening to the evidence and speeches in mitigation, the court sentenced him to a period of two years imprisonment.

This note describes the main conclusions of the *Findlay* report and explores those areas where the need for reform had already previously been identified and where policies have been settled to implement those reforms.[2]

11. The Courts-Martial Procedure

A court-martial is a "once and for all" creature brought into existence by a convening order and dissolved at the end of the trial by the convening authority. **A** general court-martial, such as the one that tried Findlay, must be convened by a "qualified officer,"[3] or by any officer to whom the primary qualified officer has delegated his authority by warrant provided that he is under the command of the qualified officer and holds not less than the rank of colonel.

The convening officer signs the convening order which establishes the court-martial. The convening officer also must direct the charges on which the accused is to be tried and ensure that the accused has been remanded for trial on the appropriate charges by the correct authority.[4] The convening officer must decide whether there should be one or more charge sheets and, if there is more than one accused, whether they should be tried separately or jointly.5 Additionally, the convening officer also has to appoint an officer subject to military law or counsel to prosecute, fix a time and place for the trial and, most importantly, select and appoint the officers to be members of the court. The convening officer has several additional duties in connection with the preparation of the trial, including ensuring that the accused is given a proper opportunity to prepare his or her defence and taking the necessary steps to secure the attendance of both prosecution and defence witnesses.[6]

Once the trial starts, should the accused or his legal representative make certain preliminary applications, the ruling of the court, in each such instance, must be reported to the convening officer for his ultimate decision as to whether the case should continue or whether the court should be dissolved.[7] If an accused offers a plea of

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[2] The comments in this note relate only to the Army and the Royal Air Force. The Royal Navy has somewhat different procedures, but they too will be introducing broadly similar changes.

[3] **A** qualified officer is any officer not below the rank of field officer or corresponding rank being in command of a body of regular forces or in command of the command within which the proposed defendant is serving. ***See*** Army Act §§ 86(1), 86(5) (1955).

[4] Rules of Procedure. Rule 22(1)(b) (Army 1972).

[5] *Id.* Rule 22(1)(d), (e).

[6] *Id.* Rule ***22*** generally.

[7] *Id.* Rules 37, 38.

guilty to the lesser of two alternative charges, the convening officer must give his approval to the acceptance of such plea.[8] The prosecutor usually signifies the convening officer's concurrence when dealing with the proposed pleas.

The convening officer is the only person who can dissolve the court. The convening officer may do so in certain circumstances and when he thinks it is in the interests of justice to do so.[9] The order to dissolve the court brings its life to an end; if the convening order is to be regarded as the birth certificate for a court-martial, the order to dissolve it is the death warrant. Finally, the convening officer also may be the authority responsible for confirming the finding of guilt and sentence post-trial.

111. Post-trial

After a finding of guilty, the accused may petition the confirming officer to request that the finding or sentence not be confirmed, or that the sentence be mitigated, giving grounds and setting out arguments for so saying.[10] The confirming authority has the power to withhold confirmation of any finding (which does not preclude a retrial) or to reduce (but not increase) a sentence. If, despite a petition, or where there has not been one, finding and sentence are confirmed unchanged, the accused can present another petition at the next level in the chain of command until he reaches the Service Board in question. Apart from the Sovereign, to whom recourse is only very rarely sought, the Service Board is the highest review body. Confirmation and these reviews all take place in the offices of the authority concerned and the petitioner has no right to be present. He is given no reason for the decision and does not have sight of the advice given by The Judge Advocate General. (However, the various Service Boards have recently introduced informal machinery for supplying the reasons for their decisions to the petitioner.) The Judge Advocate General or one of his delegated lawyers invariably gives advice to the confirming and reviewing authorities.

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[8] *Id.* Rules 41(2), 42(3), 43(2).

[9] For example, if the members of the court-martial heard a piece of prejudicial and inadmissible evidence by inadvertence, it might be necessary for the court to be dissolved and for there to be a retrial by a new court.

[10] Army Act § 108 (1955).

IV. The European Convention on Human Rights

In March 1951, the government of the United Kingdom ratified the Convention for Human Rights and Fundamental Freedoms. The Convention provides a broad framework of basic guarantees of citizens' rights and freedoms and further provides for legal redress by way of a declaration for aggrieved persons when a breach has occurred. The Convention also allows for compensation for a resulting breach. An applicant approaches the European Court of Human Rights by making a preliminary submission to the Commission. The Commission takes written and oral argument from the parties and then issues a Report. If, at this stage, the finding is in favour of the applicant, the case can be settled between the Commission and the government. If, however, no settlement is determined, the case will be referred to the full Court for a definitive decision. The government of the United Kingdom has formally accepted the jurisdiction of that Court.

Article 6(1) of the Convention for Human Rights and Fundamental Freedoms, in so far as it is relevant to the present discussion, reads as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . . .

Although some European case law addresses the effect of this Article—to include cases involving the military disciplinary law of some of the signatories to the Convention[11]—neither the Commission nor the Court has hitherto scrutinised the British courts-martial system. In Findlay's case, the matter is scheduled to go before the full Court in the fall of 1996, and the government of the United Kingdom is expected to make a vigorous defence of the system.

V. The *Findlay* Case

It is not necessary to go into any great detail in relation to this case. The applicant's lawyer made a number of specific complaints about his trial, upon most of which the Commission made no findings on the basis that since they held to be admissible the criticism of the general features of the system that he had levied, it was not necessary for them to consider particular and detailed complaints about

[11] For example, ***see*** Engel, European Court of Human Rights, June 6, 1976, Series **A** No.22 (decision of the European court).

this one trial. Furthermore, because they found that the court showed no disfavour to Findlay personally, they determined that no subjective unfairness existed. However, the Commission did find that the trial presented what they described as "objective" unfairness. The foundation for this finding sounds a resonance with the well-known adage that justice must be seen to be done:

> In addition, an objective test must also be applied, that is ascertaining whether sufficient guarantees exist to exclude any legitimate doubt . . . . [I]t must be determined whether there were ascertainable facts, particularly of internal organization, which might raise doubts as to impartiality. In this respect, even appearances may be important: what is at stake is the confidence which the Court must inspire in the accused in criminal proceedings and what is decisive is whether the applicant's fear as to a lack of impartiality can be regarded as objectively justifiable.[12]

VI. The Commission's Report

The Commission found that the role of the convening officer was unsatisfactory. They also expressed some unease about the ad hoc nature of the membership of the court, and they were not satisfied with the post-trial procedure. They were concerned by the fact that an appeal against sentence only on the part of a service member is not permitted to the civilian Courts-Martial Appeal Court. Arguably, the Commission might have taken a different view had the service member been permitted full rights of appeal to a higher civilian court:

> The question remains as to whether the defect in the court-martial was remedied by a form of subsequent review by a judicial body that afforded all the guarantees required by Article 6 para. 1 of the Convention . . . where (as in the present case) the accused pleads guilty and cannot appeal to the Courts-Martial Appeal Court, there is clearly no such remedy. . . . .[13]

The Commission's Report therefore principally criticised three aspects of the system. First, attention was drawn to the role of the

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[12] Report, ***supra*** note 1, para. 90. A right to appeal to the civilian higher courts was first established by the Courts-Martial (Appeals) Act 1951, later replaced by the Courts-Martial (Appeals) Act 1968. Although both statutes conferred a right on a service member to appeal against conviction and for a civilian to appeal against conviction and sentence, neither gave any right of appeal in the case of a service member against sentence only. See § 8(1) Courts-Martial (Appeals) Act 1968.

[13] *Id.* para. 107.

convening officer which, the Commission observed, made him at least appear to be part prosecutor. "The Commission therefore considers that, whether or not the convening officer is as a matter of fact the prosecuting authority, he is seen to be central to the prosecution of the case by court-martial."[14] Where the convening officer also confirms the finding and sentence, the Commission found that "[tlhis dual role of the convening officer gives further cause to doubt the independence of the court-martial from the prosecuting authority."[15]

Second, the Commission considered that the post-trial procedure was objectionable in that it was held in private:

> [Tlhe reviewing authorities were Army officers, the second of whom was the superior of the first fulfilling their duties as delegates of the Army Board. The lack of effectiveness in post-trial hearing reviews is further emphasised by the secrecy surrounding those reviews (including the fact and nature of the advice given by the Judge Advocate General's Office) and the applicant's inability to participate in those reviews in any meaningful manner.[16]

Third, the Commission believed that the requirement to take an oath could not of itself guarantee the independence of the members of a court-martial. The Commission further stated that the ad hoc nature of a court-martial was inconsistent with the "constant view of the Court that an established term of office is an important guarantee of a tribunal's independence." The Commission remarked that, "[i]n the present case, whilst one of the members was a Permanent President, the remaining Members went back to their ordinary military duties at the end of the applicant's court-martial."[17] The Commission's overall view was that "the applicant's fears that the court-martial lacked independence from the prosecuting authority in the case could be regarded as objectively justified particularly in view of the nature and extent of the convening officer's roles, the composition of the court-martial, and its ad hoc convening."[18]

The government argued, inter alia, that the court was independent and impartial, albeit that the convening officer performed the various functions that were criticised. The government placed great reliance on the independence and impartiality of the judge advocate at Findlay's court-martial. Furthermore, the government submitted that the judge advocate's presence at the hearing guar-

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[14] *Id.* para. 99.
[15] *Id.* para. 101.
[16] *Id.* para. 107.
[17] *Id.* para. **105.**
[18] *Id.* para. 106.

anteed a sufficiently independent element to meet the criticisms of the applicant. Judge advocates who officiate at courts-martial in the United Kingdom Armed Forces are civilians. They hold full-time judicial appointments under The Judge Advocate General, himself a civilian, and they are appointed by the Lord Chancellor, whose department is entirely separate from the Ministry of Defence. Therefore, judge advocates are neither employed nor paid by the Ministry of Defence nor are they under any orders from that Ministry or from any of the Services.

The applicant argued that The Judge Advocate General and his representatives are not independent because they are called on to give advice to the Secretary of State for Defence on general military law, which places The Judge Advocate General vis-a-vis the Ministry of Defence in a lawyer/client relationship. Thus, so the submission ran, the independence of The Judge Advocate General and his judicial staff is compromised. The Commission came to the conclusion that, because the judge advocate was not a member of the court but was there simply as an adviser, his input was not sufficiently telling to remedy the apparent flaws that had been identified. The Commission left unanswered the question as to whether the trial judge advocate could be described as "independent." They found it unnecessary to decide this question in light of their decision that the judge advocate was not sufficiently integrated into the court-martial.

> [E]ven assuming that this connection between the Judge Advocate General's Office and the Ministry of Defence does not raise a reasonable doubt as to the independence of that Office, and consequently of the Judge Advocate, the involvement of the Judge Advocate in the court-martial is not sufficient to dispel any doubt as to the court-martial's independence. In the first place, the Judge Advocate is not a Member of the court-martial. Secondly, he does not take part in the deliberations on the charges and any advice requested, as to the general principles governing the approach to sentencing, is given in private."[19]

VII. The Proposals

The proposed policy is that the role of the convening officer should be drastically altered by greatly reducing it. Indeed, the very title would disappear and the position would be designated the "higher authority." In the future, the convening officer's only function in the trial would be to decide whether the case of a particular

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[19] *Id.* **para. 103.**

service member should be referred for possible prosecution by a court-martial. The convening officer would have the benefit of brief initial legal advice in reaching that conclusion but, having done so, would turn over the case to a newly created prosecuting authority. The prosecuting authority would be drawn from the ranks of the Army and Royal Air Force Legal Services but would be entirely independent from the chain of command. The prosecuting authority would be responsible for settling, withdrawing, or adding new charges and, in light of all the available evidence, deciding whether to prosecute at all. On that matter, the prosecuting authority would assume the responsibility for making an independent decision. The prosecuting authority also would be solely responsible for the conduct of the case at trial and the convening authority would no longer have a part in any court-martial decisions. The decision to dissolve the court-martial would lie with the court. Confirmation would be abolished and it follows that the previous role played by the convening authority in confirming finding and sentence would disappear.

The result of these changes would increase court-martial autonomy and make it completely self-reliant; it would no longer be a delegate of the convening officer. The choice of members for the court would be undertaken by a new administrative unit which also would be outside the chain of command. Therefore, the members selected to serve on a court-martial would be totally independent of the convening officer and the prosecuting authority because they would not be under the command of any of the relevant authorities concerned with the case.

Service members would be permitted to apply for leave to appeal to the Courts-Martial Appeal Court against sentence or finding. This reform would bring service members in line with those civilians who are subject to the jurisdiction of a court-martial and who are convicted and sentenced by it.

VIII. The Judge Advocate's Role

A number of changes are proposed to strengthen the position of the judge advocate at trial and to meet the Commission's conclusion that the judge advocate is not playing a sufficiently proximate part in court-martial activities. First, a judge advocate would be present at all courts-martial, whatever the offence. In the past, judge advocates have not been appointed to deal with relatively minor offences such as being absent without leave. This would ensure uniformity of approach throughout the system. Second, the judge advocate's ruling on law would be binding on a Court-martial. Presently, there

remains a lingering right of the court-martial to dissent from the judge advocate's advice on law although this must be for grave and weighty reasons which need to be reduced to writing.[20] Third, the judge advocate would become a member of the court-martial although he would still not have a vote on finding or take part in any necessary fact-finding process except on a voir dire involving mixed law and fact. Fourth, the judge advocate would have a right to vote on the sentence to be passed. As it stands now, the judge advocate merely gives advice to the court on sentence.

IX. Post-trial Procedure

The present post-trial review structure would be demolished. In its place would be a "one stop" review carried out at one or two star general rank or its equivalent. A post-trial review would take place for every court-martial, whether the convicted individual desires it or not. The convicted defendant would, however, still have the right to present a petition for the consideration of the reviewing authority in which the defendant could make specific complaints against the finding or the sentence. While the advice of The Judge Advocate General would still be obtained in the case of each such review, the petitioner or his legal representative would be supplied with a written copy of that advice, together with the reviewing authority's reasons for his decision.

The principal object of the review would be to look for flaws in the procedure or in the summing-up, or for manifest errors in sentencing, so that these matters could be addressed at an early stage. When there has been a clear misdirection in law, or when a fundamental procedural error has occurred which is material and cannot be cured, convictions could be quashed at the review stage and, if necessary, a retrial could then be ordered. This "weeding out" process should enable a retrial to be ordered or a sentence mitigated much sooner after conviction than if the case were to be taken all the way to the Courts-Martial Appeal Court. This screening stage should ensure that only in cases where there is doubt on a point of law or mixed law and fact will the civilian appellate court be troubled with an appeal.

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[20] Rules of Procedure, Rule 80(3) (Army **1972).**

X. Conclusion

The reforms which I have outlined should be welcomed. The object of all the proposals is to bring courts-martial more in line with its civilian equivalent. A court-martial ought to be a military "Crown Court."[21] The improvements in the judge advocate's role should place him much more in the position of a civilian circuit judge. The greater self-regulation and autonomy that a court-martial would be permitted would underline the confidence felt in the court's ability to reach the right decision without the need for outside confirmation or consultation. The alterations to the post-trial procedure should meet the criticism that it is not appropriate to hold these reviews behind closed doors, particularly when service members will be able to apply for leave to appeal against conviction and sentence to a court outside and independent of the military system of justice. The result of all these changes will be a modernisation of the system to ensure that it will continue to enjoy the confidence which it deserves.

[21] A Crown Court is a court that would try civilians for the same sort of offences.

WHAT A COMMANDER LOOKS FOR IN A STAFF JUDGE ADVOCATE

MAJOR GENERAL GEORGE G. KUNDAHL*

I. Introduction

When I took command of the 97th United States Army Reserve Command at Fort Meade, Maryland, I expected to spend more time with the Deputy Chief of Staff for Operations, or the Deputy Chief of Staff for Training, than with any of my other staff officers. I quickly discovered that I spent far more time with my Staff Judge Advocate (SJA). My predecessor had remarked to me that a quarter of his time was devoted to personnel actions, most of them adverse. I found that to be true as well. Adverse personnel matters require a commander to consult continuously with his senior legal advisor.

However, the roster of issues requiring legal input is far more extensive than personnel actions. What follows is a partial list of the matters I worked on with my SJA during twelve weekend drills.[1]

- sixty administrative separation boards,
- three commander's inquiries on adverse officer evaluation reports and noncommissioned officer evaluation reports,
- seven Reports of Survey,
- six AR 15-6 investigations,
- two letters of reprimand for senior officers;
- two civilian labor law disputes,
- two cases referred to the Criminal Investigation Division Command,
- imposition of an Article 15 on a senior Active Guard Reserve noncommissioned officer,

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[1] This article is an edited version of Major General Kundahl's remarks at The Judge Advocate General's Interservice Continuing Legal Education Training Conference, held at the National War College, Fort McNair, Washington, D.C., on 9 March 1996.

- review of five financial disclosure forms,
- four standards of conduct problems,
- one major environmental law problem, and
- two letters of commendation.

I learned that the experience of other general officer commanders is similar when I attended the Senior Officers Legal Orientation Course at The Judge Advocate General's School with other senior leaders of the United States Army Reserve and Army National Guard.

I have worked with hundreds of attorneys and served for nine years as Executive Director of the United States Securities and Exchange Commission, as Principal Deputy Assistant Secretary of Defense for Reserve Affairs in the Bush Administration, and as an Army officer for thirty-four years, in positions as a commander at the colonel and general officer level for nine of the past ten years. These associations with members of the legal profession in a variety of environments have enabled me to formulate my criteria for individuals from whom I accept legal advice.

11. Qualities

A. *Good Judgment*

Good judgment tops the list of the qualities that I seek in a military attorney. This is the most important quality that an attorney, or any of us, can possess, and this quality becomes more important to me with each passing year. Good judgment is the ability to offer sensible solutions to difficult problems and the capacity to apply generally accepted principles and concepts to ordinary affairs. Good judgment is not taught in college or necessarily learned in law school. It is, however, found on DA Form 67-8, the United States Army Officer Evaluation Report. Part IV, "Performance Evaluation—Professionalism," contains the following, "8. Displays sound judgment."

Intelligence is not the same as sound judgment. There are many individuals in our society with IQs of 160 who work for bosses with intellects at the 100 level.[2] In his recent book, *Emotional Intelligence,*[3] Daniel Goleman confirms this truism with his observation that high intelligence does not guarantee success in life. Goleman cites the following example:

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2 DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 41-44 (New York, Bantam Books, 1995).

3 *Id.*

> When ninety-five Harvard students from the classes of the 1940s—[that is, at] a time when people with a wider spread of IQ were at Ivy League schools than is presently the case—were followed into middle age, the men with the highest test scores in college were not particularly successful when compared to their lower-scoring peers in terms of salary, productivity, or status in their field. Nor did [those who had the highest test scores] have the greatest life satisfaction, or the most happiness with friendships, family, and romantic relationships.[4]

Goleman concludes that high test scores and intelligence are not as important to success in work and life as emotional intelligence or character.[5]

Goleman defines the high IQ-type male or female as one "adept in the realm of the mind but inept in the personal world."[6] To Goleman, the high-IQ male is "typified . . . by a wide range of intellectual interests and abilities. He is ambitious and productive, predictable and dogged, and untroubled by concerns about himself. He also tends to be critical and condescending, fastidious and inhibited, uneasy with sexuality and sensual experience, inexpressive and detached, and emotionally bland and cold."[7]

In contrast, Goleman describes emotionally intelligent males as "Men who are . . . socially poised, outgoing and cheerful, not prone to fearfulness or worried rumination. They have a notable capacity for commitment to people or causes, for taking responsibility, and for having an ethical outlook; they are sympathetic and caring in relationships. Their emotional life is rich, but appropriate; they are comfortable with themselves, others, and the social universe they live in."[8]

Goleman also describes the high-IQ female. "Purely high-IQ wom[en]," he writes, "have the expected intellectual confidence, are fluent in expressing their thoughts, value intellectual matters, and have a wide range of intellectual and aesthetic interests. They also tend to be introspective, prone to anxiety, rumination, and guilt, and hesitate to express their anger openly (though do so indirectly)."[9]

Goleman finds that emotionally intelligent females tend to be "assertive and express their feelings directly, and to feel positive

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4 *Id.* **at 35.**

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at **45.**

9 *Id.*

about themselves; life holds meaning for them. Like men, they are outgoing and gregarious, and express their feelings appropriately (rather than, say, in outbursts they later regret); they adapt well to stress. Their social poise lets them easily reach out to new people; they are comfortable enough with themselves to be playful, spontaneous, and open to sensual experience. Unlike the women purely high in IQ, they rarely feel anxious or guilty, or sink into rumination."[10]

Let me be clear about one thing, all of us have a mix of IQ and emotional intelligence. However, I agree with Goleman's conclusion that, "of the two, emotional intelligence adds far more of the qualities that make us more fully human."[11] In the end, Goleman states: ''There is an old-fashioned word for the body of skills that emotional intelligence represents, *character.*"[12]

I submit that SJAs who exercise good judgment and common sense are those who possess character or "the body of skills that emotional intelligence represents."[13] Specifically, SJAs with character or emotional intelligence exhibit the following qualities:

- socially poised,
- outgoing and cheerful,
- not fearful or worried,
- responsible,
- ethical,
- comfortable with themselves,
- comfortable with others,
- at ease in their social environment,
- have a sense of humor,
- upbeat,
- optimistic,
- secure in who they are, and
- self-confident.

Staff judge advocates who possess these qualities and traits tend to exercise good judgment and common sense.

The quality of good judgment and common sense is the most important in deciding difficult legal questions, and it is the first quality I look for in a staff judge advocate. Over a career that has exposed me to literally hundreds of attorneys, I can honestly say that there have been only a handful who demonstrated these qualities and whom I would choose to represent me personally in a legal matter of grave importance.

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10 *Id.*

11 *Id.*

12 *Id.* at **285.**

13 *Id.*

B. Competence

It is natural to expect an SJA to be well schooled in the law, both military and civilian. Again, the officer evaluation report addresses this quality in Part IV:

1. Possesses capacity to acquire knowledge/grasp concepts

2. Demonstrates appropriate knowledge and expertise in assigned tasks

Staff counsel must be capable, productive, and effective. An SJA must be able to listen carefully to the commander and to others knowledgeable about an issue; understand the facts; relate the facts to law; identify the issues raised; and offer advice well grounded in the law. If the answer is unclear, the SJA should let the commander know this as well. Staff judge advocates also must be objective and be prepared to argue both sides of the issue. They should be able to see the matter from the perspective of the command and the Army and be able to see the matter from the perspective of the individual soldier or the organization in opposition.

Only the tough questions arrive on the commanding general's desk. The easier ones are picked off by subordinates. When an attorney presents an issue as an open-and-shut case, I become suspicious. I have to ask myself, "Why does the proponent insist on pursuing this matter if it is so obviously a loser?"

Lawyers must be capable of producing work of the highest quality, quickly and efficiently. They must pay attention to detail, for the devil is in the details. I recall an S3 for whom I once worked telling me, 'You concern yourself with the details; I'll handle the big picture." As commanding general, I make the policy. The SJA must provide credible legal input that has been professionally researched and analyzed.

Work submitted to the commander should be checked for form and substance and read carefully for grammatical and spelling errors. I recall an analogous anecdote in **A *Passion* for *Excellence*** involving Don Burr, then chairman of Peoples Express. Burr noted that very few passengers would appreciate whether an aircraft was flight worthy, but they could recognize a dirty serving tray and had every right to extrapolate that if the airline did not keep the cabin clean, maybe it did not perform adequate maintenance on the engines either.[14]

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[14] TOM PETERS & NANCY AUSTIN, A PASSION FOR EXCELLENCE: THE LEADERSHIP DIFFERENCE 76-77 (New York, Random House 1985).

Documents arriving in my in-box should be on time and ready for signature. I have no patience with the excuse, "It's just a first draft." I do not edit for the sake of making changes. When I am presented a poorly worded paper containing typographical or grammatical errors, I instinctively begin to worry about the author's underlying analytical skills.

C. Writing and Speaking

The toughest quality to find in today's labor market is a good writer. In response to the inquiry at a job interview, "Can you write well?", many will answer with, "I am an excellent writer." Writing well is extremely difficult. Therefore, I am suspicious about a candidate so willing to declare himself to be a real wordsmith. It should not surprise attorneys to hear that law school is considered by many outside the legal profession to be a preparation for *bad* writing.

Written work submitted to the commander must be clear and concise. Communication with the staff and subordinate commanders should be short and easy to understand. The Army cannot furnish a legal interpreter to accompany the communique and explain it. Replies to higher commands must be responsive, complete, and persuasive.

Sound writing ability leads naturally to strong oral communication skills. Military lawyers should strive to present:

- briefings that are logical, succinct, and on point; and
- presentations to commander conferences, classes of officer and enlisted personnel, family support groups, and civilian organizations that are well-organized and polished.

Both qualities, written and oral communication, are found in the officer evaluation report under professionalism.

D. Leadership

The best SJAs with whom I have worked are inspiring, decisive, and able to provide direction. These traits are necessary to obtain and retain the confidence of the commander and his staff and of subordinate commanders in need of legal counsel. The best ***SJAs*** must challenge and encourage younger military lawyers and legal technicians, both on the headquarters staff and within subordinate units. Leadership is naturally a criterion used by the annual officer efficiency system. ***An*** officer is evaluated on whether or not he or she:

4. Motivates, challenges and develops subordinates

* * * *

6. Encourages candor and frankness in subordinates

* * * *

11. Sets and enforces high standards

In addition to standard leadership skills, SJA leadership is accomplished by:

- developing a reputation for first-rate legal work;
- responding quickly and accurately to requests for legal opinions; relying upon the work of subordinate attorneys, unless they have been demonstrated to be unreliable in the past;
- being honest and direct, yet sensitive in evaluating performances of subordinates; and
- a hundred other ways taught in Army leadership courses and learned through experience.

E. Interpersonal ***Skills***

To carry out responsibilities, an SJA must be able to deal effectively with others—in the command group, with the chief of staff and primary staff, action officers, staff at higher headquarters, subordinate commanders and their staffs, Criminal Investigation Division Command personnel, Department of the Army civilians, enlisted personnel, retirees, family members, and a host of others. Strong human-relation skills make the lawyer's job easier and contribute significantly to the overall esprit de corps and morale of the command. Poor interpersonal techniques make the job difficult and can foster discontent and uncertainty.

F. Loyalty and Dedication

I am thinking here of loyalty—to the commander as is due the position. More important, I value dedication to "the good of the service," to the taxpayer, to the nation's defense, to the Army, and to the law. Loyalty must be demonstrated to one's subordinates, both officer and enlisted. ***An*** SJA exhibits dedication by always being prepared and by being willing to go anywhere at anytime to ensure that matters are handled in accordance with Army regulations, the Uniform Code of Military Justice, and the laws of the United States. Of course, the officer evaluation report addresses dedication, responsibility, loyalty, and discipline.

111. Assumptions

The foundation on which these qualities rest is the same set of expectations that I hold for any officer or senior noncommissioned officer. I expect everyone in my command to exhibit the highest levels of integrity and to be thoroughly adept in the school of the soldier. I expect no less from my SJA.

A. *Professional Integrity*

Our nation expects those of us wearing its uniform to be honest and considered ethical by others. In particular, an SJA serves as a role model and is looked upon to comply fully with the Army's expectations. The SJA is an extension of the commander by virtue of the extensive time spent together and the close working relationship attendant to a successful decision-making environment.

Integrity is necessary for credibility and to obtain the confidence of the coordinating staff and subordinate commanders. It requires the SJA to present laws and regulations in a straightforward manner, rather than slanting a legal interpretation to reflect what the SJA thinks the commander wants to hear. Likewise, legal counsel should not be canted to promote a decision or outcome desired by the SJA.

Staff judge advocates have to offer legal interpretations that are authoritative and possess the honesty to admit the inability to answer a question accurately. The caveat, of course, is that the SJA assures the commander that he or she will quickly find out the answer and convey the information. Upon making a mistake, perhaps by unintentionally giving an incorrect interpretation of the law, the SJA must have the courage to get back to the commander with the correct reading.

Maintaining the commander's confidence is another dimension of integrity. Although I am primarily referring to the attorney-client privilege, I also am talking about accurately dating documents — what I call "truth in dating'' — by not back-dating papers or changing the date after signature. The best way to achieve accuracy, I have found, is to have papers hand stamped with the date after they are signed. In short, the SJA must be truthful, trustworthy, ethical, and principled.

B. School of the Soldier

The Judge Advocate General of the Army, Major General Michael J. Nardotti, Jr., said it best, 'We are soldiers who happen to be lawyers." Like every other branch of the Army, judge advocates

must wear the uniform with pride and in accordance with Army regulations and expectations. They bear no special exemption from Army weight standards, as evidenced by regular weigh-ins. Judge advocates must be in good physical condition, as demonstrated by taking annual APFT tests along with the rest of the unit. They have to participate successfully in the field training required of other soldiers, especially weapons qualification.

IV. Conclusion

The SJA is one of the most important positions on the command staff, and as I said at the outset, the staff officer with whom I have spent the most time. For this reason, Reserve Component commanders select SJAs with great care because the entire Army is at risk if an individual commander is receiving defective legal advice. We are truly blessed in the United States Army Reserve to have an exceptionally able pool of legal talent from which to draw in selecting our SJAs. As discussed, the qualities I seek in a military lawyer in order of importance are sound judgment, competence, writing and speaking ability, leadership, interpersonal skills, and loyalty and dedication — along with the basic expectations I have for all soldiers — integrity and fundamental military appearance and regimen. My expectations are not unreasonable nor unique; they are the same qualities found on the standard Army officer evaluation report. Staff judge advocates who meet these common expectations will enhance and lengthen their military careers.

It is not often that a client has the opportunity to share with military attorneys what he requires of legal counsel, what quality of support he expects to receive, and how he wants lawyers to conduct themselves. It is my hope that the explanation of one senior commander's expectations will assist SJAs in functioning as credible staff officers, in gaining the confidence of their commanders and having greater legal input on important command decisions.

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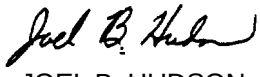

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